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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1947

No. 489

MARY MORTON WEST, OSAGE ALLOTTEE No. 192,
APPELLANT,

vs.

OKLAHOMA TAX COMMISSION

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

FILED DECEMBER 23, 1947.

SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF OKLAHOMA

No. 31948

MARY MORTON WEST, OSAGE ALLOTTEE No. 192, Plaintiff in Error,

vs.

OKLAHOMA TAX COMMISSION, Defendant in Error

PETITION IN ERROR—Filed September 9, 1944

The said Mary Morton West, Osage Allottee No. 192, plaintiff in error, complains of said defendant in error, for that the said Oklahoma Tax Commission, on the 14th day of August, 1944, rendered and entered a judgment and order whereby said Oklahoma Tax Commission ordered, adjudged and decreed that Oklahoma inheritance, transfer and estate taxes in the amount of $4,263.15 were assessed against the estate of Charles West, Jr., deceased, and ordered the same to be paid by said estate to said Oklahoma Tax Commission, in a certain proceeding then pending before said Commission wherein the protest of plaintiff in error was heard by said Oklahoma Tax Commission.

That the original record of the appeal, duly certified and attested, of all proceedings in said cause before said Oklahoma Tax Commission is hereunto attached, marked "Exhibit A", and made a part of this petition in error; and the said Mary Morton West avers that there is error in the said record and proceeding, in this, to-wit:

[fol. 3] Said Oklahoma Tax Commission erred in not rendering judgment for the plaintiff in error and in rendering judgment assessing an Oklahoma inheritance, estate and transfer tax of $4,263.15 against the estate of Charles West, Jr., deceased, and ordering same paid by said estate to said Oklahoma Tax Commission, for the following reasons, to-wit:

1. That no tax is due under the decision of the Supreme Court of Oklahoma in the case of Childers v. Pope, 119 Okl. 300, 249 Pac. 726, or at least not the amount assessed.
2. That the statute of the State of Oklahoma, to-wit, Sec-

tions 988, to 989t, inclusive, Title 68, Oklahoma Statutes 1941, under which said order of assessment was made, and said statute as applied and enforced to protestant's disadvantage by said Oklahoma Tax Commission in the making of said assessment and order, violates the 14th Amendment to the Constitution of the United States by imposing an estate tax on this estate of a part thereof which is constitutionally immune therefrom, and abridges and denies this protestant's privileges and immunities guaranteed to her by the constitution of the United States, the Osage treaties and laws, and deprives her of her property without due process of law and denies to her the equal protection of the law.

3. That said state statute, and said statute as applied and enforced to protestant's disadvantage by said Oklahoma Tax Commission in this case, in violation of the 14th [fol. 4] Amendment to the Constitution of the United States, Osage treaties and laws, imposes an inheritance and transfer tax which includes in its measure property which protestant does not receive, to-wit: (a) the value of the corpus of the undivided portion of the minerals in and under Osage County held by the United States in trust for the Osage Tribe of Indians, from which decedent during his life was permitted to receive a part of the income; (b) the value of a portion of the Osage Trust Fund determined and held by the United States, from which the decedent during his life was permitted to receive a part of the interest thereon; (c) a fractional part of the money from Osage tribal minerals received and held in trust by the United States for the Osage Tribe after payment therefrom to the decedent during his lifetime of certain annuities as provided by law.

4. That said state statute, and said statute as applied and enforced to protestant's disadvantage by said Oklahoma Tax Commission in this case, in violation of the Constitution of the United States, Osage treaties and laws, imposes on protestant an inheritance and transfer tax which includes in its measure property of the United States and property held by the United States in trust for the Osage Tribe of Indians in which decedent and this protestant had and have no individual vested property interest.

[fol. 5] 5. That said state statute, and said statute as applied and enforced to protestant's disadvantage by said

Oklahoma Tax Commission in this case, contrary to the 14th Amendment to the Constitution of the United States, Osage treaties and laws, imposes on protesant an inheritance and transfer tax which includes in its measure property held in trust by the United States long prior to the admission of the State of Oklahoma into the Union and the enactment of its first inheritance and estate tax law, and under which trust no transfer thereof took place upon the death of decedent.

6. That said state statute, and said statute as applied and enforced to protestant's disadvantage by said Oklahoma Tax Commission in this case, would interfere with and defeat the United States in performing its governmental duty to the Osage Tribe of Indians, including this protestant, and diminish the trust estate, contrary to Osage treaties and laws, which trust estate is to be delivered by the trustee to the remaindermen in 1983.

7. That the title to part of said property included in the measure of said tax is in the United States and is constitutionally immune from state taxation.

8. That if any property right passed at the death of the decedent to this protestant, it did so by virtue of federal law and not by state law.

[fol. 6] 9. That said state statute, and said statute as applied and enforced to protestant's disadvantage by said Oklahoma Tax Commission in this case, violates the rights of protestant and of the United States under Section 8 of Article 1 of the Constitution of the United States relating to commerce with the Indian Tribes.

10. That said state statute, and said statute as applied and enforced to protestant's disadvantage by said Oklahoma Tax Commission in this case, violates Section 1 of the Enabling Act (34 Stat. L. 267-278) of the State of Oklahoma.

11. That by reason of Constitutional immunity, said minerals, trust fund and proceeds from said minerals held by the United States in trust for the Osage Tribe have never been subjected to state taxation.

12. That Congress has never granted authority to the State of Oklahoma to levy a tax upon the transfer of property held in trust by the United States for the Osage Tribe of Indians.

Wherefore, plaintiff in error prays that said judgment so rendered may be reversed, set aside and held for naught, and that a judgment may be rendered in favor of the plaintiff in error, and against the defendant in error, that the plaintiff in error be restored to all rights that she has lost by the rendition of such judgment, that this court decree [fol. 7] that said estate is not liable to the Oklahoma Tax Commission or the State of Oklahoma for any inheritance, estate or transfer tax, that plaintiff in error recover her costs herein and for such other relief as to the court may seem just.

(Signed) Mary Morton West, Osage Allottee No. 192, by Frank T. McCoy, John T. Craig, John R. Pearson, Frank Mahan, Her Attorneys.

[fol. 8] EXHIBIT "A" TO PETITION IN ERROR

BEFORE THE OKLAHOMA TAX COMMISSION

Case No. 31948

In the Matter of the Inheritance Tax on the Estate of CHARLES WEST, JR., Deceased, Probate No. 4664, Osage County, Oklahoma.

Transcript of Tax Proceedings Case No. 1743

Appeal from Order of Oklahoma Tax Commission Issued August 14, 1944

APPEARANCES: McCoy, Craig & Pearson, Pawhuska, Oklahoma, Attorneys for Mary Morton West, Protestant.

E. L. Mitchell, A. L. Herr, C. W. King, Attorneys for Oklahoma Tax Commission.

[fols. 9-10] Be it remembered, That on the 22nd day of October, 1942, Joe LaBenske, Administrator of the Estate of Charles West, Jr., deceased, filed with the Oklahoma Tax Commission his return of the properties of said estate, the same being as follows:

(Here follows 4 Photolithographs, side folios 11, 11a, 11b, 11c-12.)

RETURN TO BE FILED WITH THE OKLAHOMA TAX COMMISSION IN DUPLICATE AND NONRESIDENT ESTATES

Date Received: Perforated 10-30-42

STATE OF OKLAHOMA
Estate Tax Return

Attorneys: Frank Nolan, Fairfax, Oklahoma

IN THE MATTER OF THE ESTATE OF Charles West, Jr., DECEASED.

Residence at Death Fairfax, Oklahoma Date of Death _____ Date of Birth September 2,1940

County Court of Osage County, Okla. Probate No. 4464

GROSS ESTATE

Sch.	Classification of Property	Amount	
A	REAL ESTATE, OIL AND GAS LEASES, ETC. (From Schedules A-1 and A-2, Page 3)	$ 24,294.55	
B	STOCKS AND BONDS (From Schedule B, Page 3)	66,485.06	
C	PERSONAL PROPERTY (From Schedules C-1 and C-2, Page 3)	34,527.79	
D	LIFE INSURANCE (From Schedule D, Page 3)	None	
E	TRANSFERS DURING LIFETIME (From Schedule E, Page 3)	None	
	TOTAL GROSS ESTATE WITHIN OKLAHOMA	$ 125,307.40	
F	PLUS TOTAL ESTATE OUTSIDE OKLAHOMA (From Schedule F, Page 4)	None	
	TOTAL GROSS ESTATE		$ 125,307.40

DEDUCTIONS

Sch.	Classification	Amount	
G	DEBTS AND MORTGAGES (From Schedule G, Page 4)	604.87	
H	TAXES, EXPENSES, ETC. (From Schedule H, Page 4)	5,902.99	
	TOTAL DEDUCTIONS		$ 6,507.86
	TOTAL NET ESTATE (Line 8 less Line 11)		$118,799.54
	If a part of the assets of the estate are located outside the State, drop down to line 12 and continue. LESS STATUTORY EXEMPTION ALLOWED		$

Charles West, Jr., was a full-blood, restricted member of the Osage Tribe of Indians and was never issued a certificate of competency during his life time. By reason thereof this estate is restricted and is in the possession and under the control and supervision of the Secretary of the Interior.

The Department of the Interior denies any estate tax liability on this estate to the State of Oklahoma. The Administrator joins the Department of the Interior in denying any estate tax liability to the State of Oklahoma.

TOTAL TAX	
PLUS ADDITIONAL TAX TO ABSORB _____% OF 80% OF FEDERAL ESTATE TAX	$
PENALTY	$
TOTAL TAX AND PENALTY	$

STATE OF OKLAHOMA, Osage COUNTY } AFFIDAVIT

Joe LaBenske the undersigned, do ~~XXXX~~ hereby solemnly swear, or affirm, that the above named decedent died on the 11th day of September A.D. 40 the Probate Court of Pawhuska, Oklahoma granted letters ~~XXXXXXXX~~ upon this estate and that Joe LaBenske his knowledge and information that he had ~~XXX~~ no knowledge or information of any transfers made, or trusts created, in fraud of the property of said decedent, sale of personal property, or otherwise, between the gross estate of said deceased as set out in this report and his knowledge and information that he had ~~XXX~~ no knowledge or information of any transfers made, or trusts created, in contemplation of death, or intended to take effect at or after death, except as shown on Schedule H; that to the best of his knowledge and belief the value given for each item of property as listed was the full and fair cash market value of the same at the time of death; that where the interest passed by reason of the decedent's death was a life interest, or was held by him as a joint tenant, the value of the property in which such interest existed has been written at the end of each in column (E) as property subject to such life interest; that the deductions listed were incurred by said decedent and are reasonable, correct and legally allowable.

Name Joe LaBenske, Administrator

Title

Address Fairfax, Oklahoma

Subscribed and sworn to before me this the 22nd day of October A.D. 42

D.W.Jackson Notary Public.

My commission expires Feb. 24, 1944

SEAL

SCHEDULE A-1. REAL ESTATE.

List separately each parcel or tract of real property in the State of Oklahoma of which the decedent died seized or possessed, including the homestead. If town or city property, give street number as well as lot and block number.

The law provides for a homestead exemption of not to exceed $5,000.00 (Sec. 2 (a) of the Act). Identify the property claimed as a HOMESTEAD by adding the word "Homestead" after the legal description thereof in the schedule below. CLAIM HOMESTEAD EXEMPTION below. Mortgages or other liens against the property claimed as homestead should be listed as deductions in Schedule G. Include decedent's interest in jointly owned property.

		Annual Rents or Income to Date of Death 2.	Full Appraised or Fair Cash Value at Death 3.
(If more space is required, attach additional sheets, marking same Schedule "A-1.") TOTALS			

TOTAL (Columns 2 and 3)..... $ 19,059.43

Deduct homestead exemption here (not in excess of $5,000.00)..... $ 5,000.00

TOTAL APPRAISED OR FAIR CASH VALUE OF REAL ESTATE AT DATE OF DEATH..... $ 14,059.43

SCHEDULE A-2. OIL, GAS OR MINERAL LEASES, RENTALS, ROYALTIES AND LEASEHOLD INTEREST IN STATE OF OKLAHOMA, including decedent's interest in jointly owned property.

Complete Legal Description	Character of Interest Such as Lease, Royalty, etc.	Annual Income	Appraised or Fair Cash Value at Death
1 and 919/2520ths share or head rights in and to the Osage Indian Mineral Reservation(Restricted property in exclusive control of the Secretary of the Interior)	Royalty	$450.00	$10,235.12
(If more space is required, attach additional sheets, marking same Schedule "A-2.")			

TOTAL VALUE OF OIL, GAS OR MINERAL LEASES, RENTALS AND ROYALTIES..... $ 10,235.12

TOTAL OF SCHEDULES A-1 and A-2, Real Estate, Leases, etc..... $ 24,294.55
To be carried forward to Page 1.

SCHEDULE B. STOCKS AND BONDS.

BONDS: Enter below name of issuing corporation together with number and date of all bonds. STOCKS: Enter below name of corporation and number of shares. No kind of stocks or bonds is exempt from Inheritance Tax. Include decedent's interest in stocks and bonds held jointly with others.

Complete Legal Description	Par Value 1.	Interest or Dividend Date 2.	Accrued Interest or Dividends 3.	Full and True Value at Death 4.
2-7/8% Treas. Bond of 1955-60	$50,500.00		None	$50,500.00
3-1/4 " " " 1944-46	1,600.00		"	1,600.00
2-3/4 " " " 1945-47	1,000.00		"	1,000.00
2-3/4 " " " 1956-59	11,900.00		"	11,900.00
Osage Federal Sav & Loan	1,200.00		"	1,200.00
Trust Stock	925.00		"	231.31
Share Account	53.57		"	53.75
(If more space is required, attach additional sheets, marking same Schedule "B.")				
TOTALS.....				

TOTAL STOCKS AND BONDS, including interest and dividends (Columns 3 and 4)..... $ $66,485.06

To be carried forward to Page 1. 66,485.06

Complete Legal Description	Assessed Value of Undivided Interest of Decedent	Assessed Value of Decedent's Interest in Real Estate	Full Appraised or Fair Cash Value of Decedent's Interest
Lots 1 & 2; E½ of NW¼ of Sec 31, Twp. 24N Rge 4 EIM	985.00	None	966.18
S½ of Lot 7 & all Lot 8, Block 27, Original Townsite of Fairfax, Oklahoma, (Homestead)	1,715.00	None	6,000.00
1/18 INTEREST IN E½ SW¼; W½ SE¼ Sec. 23 Twp. 28N Rnge 6 E IM,	63.88	None	133.33
N½ SW¼; SW¼ SW¼ Sec. 1 Twp. 22N Rge 8E & NW¼ NW¼ sec. 12, Twp, 22N Rge 8E, IM,	38.00	None	133.33
S½ NW¼; NE¼ SW¼ Sec 4 & SE¼ NE¼ Sec 5 Twp 23N Rge 7 EIM.	43.00	None	106.66
SE¼ Sec 27 Twp 21N Rge 10E	21.00	None	31.33
S½ SE¼ SE¼ Sec 36 Twp 21N Rge 10E	3.50	None	3.33
1/6 INTEREST IN Lot 1, S½ NE¼ Sec 1 Twp 24N Rge 5E	153.00	None	1,391.66
Lots 3 & 4; SE¼ NW¼ Sec 6 Twp 24N Rge 6E	130.00	None	340.00
SE¼ SE¼ Sec 36 Twp 25N Rge 5E	48.50	None	100.00
Lot 4 Sec 31 Twp 25N Rge 6E	50.00	None	100.00
Lots 1 & 2; NW¼ NE¼; E½ NW¼ Sec 30 Twp 23N Rge 11E	69.00	None	160.00
1/3 INTEREST IN			
NE¼ SE¼ sec 1 Twp 24N Rge 5E & Lots 6 & 7; SE¼ SW¼ Sec 6 T. 24, R6	395.00	None	1,833.33
Lots 3 & 4; S½ NW¼ Sec 5 Twp 28N Rge 8E	303.33	None	785.00
SE¼ NE¼; E½ SE¼ sec 24, Twp 28N Rge 7E & NE¼ NE¼ Sec 25 T28N, R7E	385.00	None	800.00
Lots 3 & 4; E½ SW¼; SW¼ SE¼ Sec 30 Twp 23N Rge 11E	138.33	None	320.00
Lots 3 & 4 Blk 24 Ot Fairfax Okla.	666.66	None	1,666.66
Lots 4 & 5 Blk 32 OT Fairfax, Okla.	480.00	None	600.00
1/4 INTEREST IN NW¼; N½ NW¼ SE¼ Sec 14 Twp 21 N Rge 9E	96.25	None	90.00
Lots 1 &2; NE¼ ; E½ NW¼ sec 7 Twp 28N Rge 9E	550.00	None	1,148.62
SE¼ Sec 6 Twp 28N Rge 9E	287.25	None	600.00
NE¼; NW¼; SE¼ Sec 8 Twp 28N Rge 9E	862.50	None	1,800.00
E½ SW¼; N½ SE¼ Sec 18 Twp 28N Rge 8E	231.25	None	500.00
Lot 4; SW¼ NW¼; N½ NW¼ SW¼ sec 2 Twp 24N Rge 10E	53.75	None	125.00
S½ S½ SE¼ NE¼; N½ N½ NE¼ SE¼; S½ S½ NE¼ SE¼; E½ SE¼ NW¼ SE¼; and S½ N½ NE¼ SE¼; N½ SE¼ NE¼ SE¼ Sec 26 Twp 22 N Rge 9 E	48.75	None	25
Lots 4 & 5 Block 35 OT Fairfax, Okla	310.00		300
Total	$8,127.95		$19,05

SCHEDULE C-1. PERSONAL PROPERTY

List hereunder all CASH on hand or on deposit, NOTES, MORTGAGES, ACCOUNTS RECEIVABLE due at date of death, CONTRACTS OF SALE and decedent's INTEREST IN PARTNERSHIPS located both within and without the State of Oklahoma. Due dates of notes and mortgages should be clearly shown, together with accrued interest from last payment to the date of death. Include decedent's interest in joint accounts, deposits, etc.

Description of Items	Name of Bank, Trustee or Debtor	Face Value (1)	Accrued Interest (2)	Appraised or Fair Cash Value at Death (3)
Trust Funds in The United States Treasury	Secretary of Interior	$4,745.52	None	$4,745.52
Cash surplus in the U.S. Treasury,	Secretary of Interior	$29,046.27	None	29,046.27
(If more space is required, attach additional sheets, marking same Schedule "C-1.")		TOTALS.....	$	$ 33,791.79
		TOTAL COLS. 2 AND 3		$ 33,791.79

SCHEDULE C-2. TANGIBLE PERSONAL PROPERTY.

List hereunder each item of decedent's personal property such as HOUSEHOLD FURNITURE, SILVERWARE, PICTURES, WORKS OF ART, BOOKS, JEWELRY, WEARING APPAREL, LIVE STOCK, AUTOMOBILES, TRUCKS, TOOLS, FARM IMPLEMENTS, FARM PRODUCTS, GROWING CROPS, BUILDINGS ON LEASED PREMISES, STOCKS OF MERCHANDISE, ETC. Include decedent's interest in property held jointly with others.

Complete Description	Location	Appraised or Fair Cash Value at Death
One saddle	Home	$50.00
One lawn mower	"	8.00
One garden hose	"	1.00
Household Furniture	"	676.50
(If more space is required, attach additional sheets, marking same Schedule "C-2.")	TOTAL.....	$ 736.00

TOTAL VALUE OF PERSONAL PROPERTY (Schedules C-1 and C-2) ..... $ 34,527.79
(To be carried forward to Page 1)

SCHEDULE D. LIFE INSURANCE.

List hereunder policies of insurance held on the life of the decedent, however payable; also annuities, cash surrender values, etc. (For exceptions see Instructions.) Proceeds of life insurance policies payable to decedent's ESTATE are taxable. The law, however, provides an exemption, not in excess of $20,000.00 where the insurance is payable to NAMED BENEFICIARIES, but the full amount payable should be listed in the schedule, and exemption claimed below.

Name of Insurance Company	Name of Beneficiary or Trustee	Face Value	Amount Payable at Death
None			
(If more space is required, attach additional sheets, marking same Schedule "D.")	TOTALS.....	$	$

CLAIM EXEMPTION HERE OF THE AGGREGATE AMOUNT OF INSURANCE PAYABLE TO NAMED BENEFICIARIES, BUT IN NO EVENT SHALL SAID EXEMPTION EXCEED $20,000.00..... $ None

TOTAL AMOUNT OF INSURANCE (Less exemptions)..... $ None
(To be carried forward to Page 1.)

SCHEDULE E. TRANSFERS DURING LIFETIME OF DECEDENT.

List hereunder all transfers of property, real, personal, or mixed, or any interest therein, made by decedent which were intended to take effect in possession or enjoyment at or after death, regardless of the date of the transfer.

Likewise list all transfers made by decedent of property, real or personal, or any interest therein, either in trust or by deed, bargain, sale or gift, where such transfers were made without an equivalent in monetary consideration, within two (2) years of the death of the decedent.

Likewise list all transfers of property, real, personal, or mixed, or any interest therein, whether in trust, by deed, bargain, sale or gift, where such transfer was made in contemplation of death.

Legal Description	Name and Address of Transferee	Relation to Decedent	Value at Date of Death or Transfer	
			Assessed Value	Appraised Value
None				
(If more space is required, attach additional sheets, marking same Schedule "E.")				
TOTAL TRANSFERS DURING LIFETIME (To be carried forward to Page 1.)	None			

SCHEDULE F. PROPERTY OUTSIDE OKLAHOMA

List hereunder the total gross value of all real estate, or any interest therein, and all personal property having a taxable situs outside the State of Oklahoma. Debts and mortgages should be listed under deductions, Schedule G.

A statement of the value of the property located outside the State is required only for the purpose of arriving at the percentage of deductions and exemption allowed by Statute in computing tax liability in the Oklahoma estate.

REAL ESTATE, LEASES AND ROYALTIES—Gross Value..... $ None

PERSONAL PROPERTY—Gross Value..... $ None

TOTAL GROSS ESTATE OUTSIDE OF OKLAHOMA..... $ None

SCHEDULE G. DEBTS AND MORTGAGES.

List hereunder all valid debts of the decedent DUE AND OWING AT DATE OF DEATH.

Name and Address of Creditor or Mortgagee	Nature of Claim, Date and Term Thereof	Description of Claim or of Property Pledged	Amount
Palace Trading Company	Grocery Account		$241.00
Vivian Pitts	Sewing		30.00
Big Hill Trading Co.	Dry Goods		49.92
Dr. A. H.Friedman	Dental visit		5.00
Dr. E. N. Lipe	Doctor bill		97.00
Dr. Emil Tholin and Dr.Fredrick Belyeat	Doctor bill		50.00
Mary Gayle Powell	Nurse bill		39.00
Dr. D.M.Ghrist	Doctor bill		11.50
Pauline Blankenship	Nurse bill		30.00
Dr. H.B.Spaulding	Doctor bill		5.00
Dr. C.G.Abbott	Doctor bill		26.50
Physicians and Surgeons	Hospital bill		28.95
	Total		$604.87

FUNERAL EXPENSES $677.00 Monument $ 459.45	1,136.45
ADMINISTRATION EXPENSES	468.52
ATTORNEY'S FEES	698.02
WIDOW'S or FAMILY ALLOWANCE (allowed by the Court and paid)	3,600.00
BEQUESTS: CHARITABLE, RELIGIOUS AND EDUCATIONAL WITHIN THE STATE OF OKLAHOMA. (List like bequests outside of Oklahoma in Schedule I.) (If more space is required, attach additional sheets, marking same Schedule "G.")	None
VALUE UPON WHICH ESTATE TAX PAID WITHIN LAST FIVE YEARS (Identify property included in both estates.)	
TOTAL SCHEDULE H—DEDUCTIONS (To be carried forward to Page 1.)	$ 5,902.99

SCHEDULE I. DISTRIBUTION.

List below names, ages and addresses of heirs, devisees, and legatees of the decedent. If decedent left a life estate in any property listed herein, describe fully below.

Name and Address	Age : Relationship	Net Value of Share or Value of Property Set Aside	
		Collateral Heirs and Others	Lineal Heirs
Opal West, Fairfax, Oklahoma	legal wife	(see note)	
Mary Morton West, Ralston, Oklahoma	mother	(see note)	

Charles West, Jr., died intestate leaving no issue, but a surviving widow, Miss Opal West, Fairfax, Oklahoma, and a surviving mother, Mary West Kenworthy.

There is an act of Congress which prohibits Mrs. Opal West from inheriting any part of the estate of Charles West, Jr., un

[fol. 13] OKLAHOMA TAX COMMISSION

State of Oklahoma

Oklahoma City

J. Frank Martin, Chairman; J. D. Dunn, Vice-Chairman; R. H. Sibley, Member. H. D. Canfield, Secretary.

Estate Tax Division

NOTICE OF TAX LIABILITY

Mr. Frank Mahan, Attorney at Law, Fairfax, Oklahoma.
Re: Estate of Charles West, Jr.

DEAR SIR:

An audit of the estate tax return in the above estate reveals tax liability as shown by the Oklahoma Tax Commission's Order of Assessment, certified copies of which are enclosed herewith.

If the computation is found satisfactory one copy of the Order may be retained for your file, the other to be returned to this office accompanied by a check or draft made payable to the Oklahoma Tax Commission in the amount shown due.

If, however, upon receipt of the order and this notice any interested party is dissatisfied with the findings or assessment of any appraisement made by the Oklahoma Tax Commission, as reflected by said order, they are authorized, within thirty days from and after the date thereof, to file with the Tax Commission their objections, in writing, [fol. 14] specifically setting forth the ground of their objections, and if such objections are filed with the Tax Commission within said thirty day period, same will be set down for hearing on a day convenient for all concerned.

Thanking you for your cooperation in this matter, we are
Yours very truly, Oklahoma Tax Commission. By
—— ——, Director, Estate Tax Division.

encl.

Remittances should be made payable to the Oklahoma Tax Commission and refer to Division.

Palace Trading Company	Grocery Account	$241.00
Vivian Pitts	Sewing	30.00
Big Hill Trading Co.	Dry Goods	49.92
Dr. A. H.Friedman	Dental visit	5.00
Dr. E. N. Lipe	Doctor bill	97.00
Dr. Emil Tholin and Dr.Fredrick Belyeat	Doctor bill	50.00
Mary Gayle Powell	Nurse bill	39.00
Dr. D.M.Ghrist	Doctor bill	11.50
Pauline Blankenship	Nurse bill	30.00
Dr. H.B.Spaulding	Doctor bill	5.00
Dr. C.G.Abbott	Doctor bill	26.50
Physicians and Surgeons	Hospital bill	28.95
	Total	$604.87

FUNERAL EXPENSES $677.00 Monument $ 459.45	1,136.45
ADMINISTRATION EXPENSES	468.52
ATTORNEY'S FEES	698.02
WIDOW'S or FAMILY ALLOWANCE (allowed by the Court and paid)	3,600.00
BEQUESTS: CHARITABLE, RELIGIOUS AND EDUCATIONAL WITHIN THE STATE OF OKLAHOMA. (List like bequests outside of Oklahoma in Schedule I.) (If more space is required, attach additional sheets, marking same Schedule "H.")	None
VALUE UPON WHICH ESTATE TAX PAID WITHIN LAST FIVE YEARS (Identify property included in both estates.)	
TOTAL SCHEDULE H—DEDUCTIONS (To be carried forward to Page 1.)	$ 5,902.99

SCHEDULE I. DISTRIBUTION.

List below names, ages and addresses of heirs, devisees, and legatees of the decedent. If decedent left a life estate in any property listed herein, describe fully below.

Name and Address	Age : Relationship	Net Value of Share or Value of Property Set Aside	
		Collateral Heirs and Others	Lineal Heirs
Opal West, Fairfax, Oklahoma	legal wife	(see note)	
Mary Morton West, Ralston, Oklahoma	mother	(see note)	

Charles West, Jr., died intestate leaving no issue, but a surviving widow, Miss Opal West, Fairfax, Oklahoma, and a survi mother, Mary West Kenworthy.

There is an act of Congress which prohibits Mrs. Opal We from inheriting any part of the estate of Charles West, Jr., u she be of Indian blood. The two parties set out to litigate the Indian blood question in the courts. However, under date of May 5, 1942, the parties settled the litigation by contract of that date and said Settlement Contract was duly approved by the Secretary of the Interior on June 16, 1942, and I understand that the Osage Indian Agency, Pawhuska, Oklahoma, is about to distribute the estate in accordance with the contract which was incorporated in the decree of the Court Court of Osage County, Oklahoma, determining the heirs and ordering distribution of the estate.

A statement of the value of the property located outside the State is required only for the purpose of arriving at the percentage of deductions and exemption allowed by States in computing tax liability in the Oklahoma estate.

REAL ESTATE, LEASES AND ROYALTIES—Gross Value	$ None
PERSONAL PROPERTY—Gross Value	$ None
TOTAL GROSS ESTATE OUTSIDE OF OKLAHOMA	$ None

SCHEDULE G. DEBTS AND MORTGAGES.

List hereunder all valid debts of the decedent DUE AND OWING AT DATE OF DEATH.

Name and Address of Creditor or Mortgagee	Nature of Claim, Date and Term Thereof	Description of Claim or of Property Pledged	Amount
Palace Trading Company	Grocery Account		$241.00
Vivian Pitts	Sewing		30.00
Big Hill Trading Co.	Dry Goods		49.92
Dr. A. H.Friedman	Dental visit		5.00
Dr. E. N. Lipe	Doctor bill		97.00
Dr. Emil Tholin and Dr.Fredrick Belyeat	Doctor bill		50.00
Mary Gayle Powell	Nurse bill		30.00
Dr. D.M.Ghrist	Doctor bill		11.50
Pauline Blankenship	Nurse bill		30.00
Dr. H.B.Spaulding	Doctor bill		5.00
Dr. C.G.Abbott	Doctor bill		26.50
Physicians and Surgeons	Hospital bill		28.95
	Total		$604.87

FUNERAL EXPENSES $677.00 Monument $ 459.45	1,136.45
ADMINISTRATION EXPENSES	468.52
ATTORNEY'S FEES	698.02
WIDOW'S or FAMILY ALLOWANCE (allowed by the Court and paid)	3,600.00
BEQUESTS: CHARITABLE, RELIGIOUS AND EDUCATIONAL WITHIN THE STATE OF OKLAHOMA. (List like bequests outside of Oklahoma in Schedule I.) (If more space is required, attach additional sheets, numbering same Schedule "H.")	None
VALUE UPON WHICH ESTATE TAX PAID WITHIN LAST FIVE YEARS (Identify property included in both estates.)	
TOTAL SCHEDULE H—DEDUCTIONS (To be carried forward to Page 1.)	$ 5,902.99

SCHEDULE I. DISTRIBUTION.

List below names, ages and addresses of heirs, devisees, and legatees of the decedent. If decedent left a life estate in any property listed herein, describe fully below.

she be of Indian blood. The two parties set out to litigate the Indian blood question in the courts. However, under date of May 5, 1942, the parties settled the litigation by contract of that date and said Settlement Contract was duly approved by the Secretary of the Interior on June 16, 1942, and I understand that the Osage Indian Agency, Pawhuska, Oklahoma, is about to distribute the estate in accordance with the contract which was incorporated in the decree of the Court Court of Osage County, Oklahoma, determining the heirs and ordering distribution of the estate.

[fol. 15] OKLAHOMA TAX COMMISSION

State of Oklahoma

Oklahoma City

J. Frank Martin, Chairman; J. D. Dunn, Vice-Chairman;
R. H. Sibley, Member. H. D. Canfield, Secretary.

Estate Tax Division

September 28, 1943.

NOTICE OF TAX LIABILITY

Mary Morton West, Box 114, Fairfax, Oklahoma.
Re: Estate of Charles West, Jr., deceased

DEAR MADAM:

An audit of the estate tax return in the above estate reveals tax liability as shown by the Oklahoma Tax Commission's Order of Assessment, a certified copy of which is enclosed herewith.

If upon receipt of the order and this notice any interested party is dissatisfied with the findings or assessment or any appraisement made by the Oklahoma Tax Commission, as reflected by said order, they are authorized, within thirty days from and after date thereof, to file with the Tax Commission their objections, in writing, specifically setting forth the grounds of their objections, and if such objections are filed with the Tax Commission within said thirty day period, same will be set down for hearing on a day convenient for all concerned.

Thanking you for your cooperation in this matter, we are
Yours very truly, Oklahoma Tax Commission. By
—— ——, Director, Estate Tax Division.

encl.

[fol. 16] OKLAHOMA TAX COMMISSION

State of Oklahoma

Oklahoma City

J. Frank Martin, Chairman; J. D. Dunn, Vice-Chairman; R. H. Sibley, Member. H. D. Canfield, Secretary.

Estate Tax Division

September 29, 1943.

NOTICE OF TAX LIABILITY

Mr. Joe LeBenske, Fairfax, Oklahoma.
Re: Estate of Charles West, Jr., deceased

DEAR SIR:

An audit of the estate tax return in the above estate reveals tax liability as shown by the Oklahoma Tax Commission's Order of Assessment, a certified copy of which is enclosed herewith.

If upon receipt of the order and this notice any interested party is dissatisfied with the findings or assessment or any appraisement made by the Oklahoma Tax Commission, as reflected by said order, they are authorized, within thirty days from and after the date thereof, to file with the Tax Commission their objections, in writing, specifically setting forth the grounds of their objections, and if such objections are filed with the Tax Commission within said thirty day period, same will be set down for hearing on a day convenient for all concerned.

Thanking you for your cooperation in this matter, we are
Yours very truly, Oklahoma Tax Commission. By
J. Frank Martin, Chairman.

encl.

(Here follows 2 Photolithographs, side folios 17-18)

OTC 456-R

STATE OF OKLAHOMA
OKLAHOMA TAX COMMISSION

ESTATE TAX DIVISION

Estate of CHARLES WEST, JR. DECEASED Probate No. 4664 Osage County

Residence at Death Fairfax, Oklahoma Date of Death September 2, 1940

Executor-Administrator Joe LaBeaske Residence Fairfax, Oklahoma

ORDER ASSESSING TAX

The OKLAHOMA TAX COMMISSION, having examined the Administrators detailed return filed with it on the 30th day of Nov., 42 and after verifying same and fully considering all the facts and the law in the matter, and being well and sufficiently advised in the premises, finds:

That the value of said estate at the time of the death of the decedent, including all transfers during lifetime by deed, grant, bargain, sale or gift made in contemplation of death or intended to take effect in possession or enjoyment at or after death, as returned or which has come to the knowledge of the Commission, subject to the debts, costs of administration and exemptions allowed by law, is as follows:

Schedule	Classification of property	Amount	
A	Real Estate, Oil and Gas Leases, etc.	24,294.55	
B	Stocks and Bonds	73,505.80	
C	Personal Property	34,926.69	
D	Life Insurance	00	
E	Transfers During Lifetime	00	
	Total Gross Estate within Oklahoma	$132,727.04	
F	Plus Total Estate outside Oklahoma	$ 00	
	TOTAL GROSS ESTATE		$132,727.04
GH	TOTAL DEDUCTIONS		$ 6,507.86
	TOTAL VALUE OF NET ESTATE		$126,219.18
	Portion of Net Estate within Oklahoma 100 %		$126,219.18
I	Portion Passing to Lineal Heirs	$126,219.18	
I	Portion Passing to Collateral and Other Heirs	$ 00	
	EXEMPTION ALLOWED LINEAL HEIRS		$ 15,000.00
	TOTAL TAXABLE ESTATE		$111,219.18

The Commission further finds that said estate, or the portion thereof within the State of Oklahoma, is subject to estate, inheritance and transfer tax at the following rates:

COMPUTATION OF TAX

Amount of Block	Rate of Tax on Block	Total Tax	Amount of Block	Rate of Tax on Block	Total Tax
10,000.00	1	100.00	40,000.00	5	2,000.00
10,000.00	2	200.00	11,219.18	6	673.15
20,000.00	3	600.00			
20,000.00	4	800.00			
	TOTALS		$111,219.18		$4,373.15
	TOTAL ADDITIONAL TAX TO ABSORB BALANCE OF 80% FEDERAL TAX				$ 00
	TOTAL TAX DUE				$4,373.15
	PENALTY				$ 940.20
	TOTAL TAX AND PENALTY				$5,313.35

IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED AND DECREED by the Commission that the tax as computed above be and the same is hereby assessed; and it is further ordered that the administrator, executor, trustee or other person charged with the payment of such tax, shall pay the same to the Oklahoma Tax Commission for the use and benefit of the State of Oklahoma, together with interest, if any, as provided by law.

Ordered and approved this the 20th day of September 19 43

ATTEST: OKLAHOMA TAX COMMISSION

H.D. Canfield (SEAL) Secretary

By J.Frank Martin Chairman

J.D. Dunn Vice-Chairman

R.H. Sibley Member

APPROVED:
Walter Harris
ESTATE TAX DIVISION

Probate No. 4664

IN THE COUNTY COURT

of

Osage County

In The Matter Of The Estate Of

Charles West, Jr. Deceased

ORDER OF OKLAHOMA TAX COMMISSION ASSESSING ESTATE INHERITANCE AND TRANSFER TAXES

Filed September 20, , 19 43

Midge Anderson

Estate Tax Clerk

818

[fol. 19] [File endorsement omitted]

BEFORE THE OKLAHOMA TAX COMMISSION

Oklahoma City, Oklahoma

IN THE COUNTY COURT OF OSAGE COUNTY, OKLAHOMA

Probate No. 4664

In the Matter of the Assessment of Estate Tax Against the ESTATE OF CHARLES WEST, JR., Deceased

PROTEST—Filed October 28, 1943

Comes now Mary Morton West, full blood restricted Osage Allottee No. 192, mother and sole heir of the above named decedent, and protests against the assessment of Oklahoma Estate Taxes entered on September 20, 1943, in the amount of $4373.15, plus penalty of $940.20, and which order was duly mailed by your Honorable Commission to this protestant on September 28, 1943, and for grounds of said protest states:

1. That the statute of the State of Oklahoma, to-wit, Sections 988 to 989t, inclusive, Title 68, Oklahoma Statutes 1941, under which said assessment was made and entered and as applied by your Honorable Commission to the estate and the property thereof of said decedent, is invalid for the reason that the same is in conflict with and repugnant to the Constitution, treaties and laws of the United States [fol. 20] as the same relate to and affect the property of said decedent, this protestant and the Osage Tribe of Indians and the members and estates of members of said tribe.

2. That said assessment is invalid for the reason that this protestant claims immunity of the estate of the said Charles West, Jr., and of each and every item of property composing said estate, as hereinafter set out, from taxation under said statute, by virtue of the provisions of the Constitution, treaties and laws of the United States as the same relate to and affect the property of said decedent, this protestant and the Osage Tribe of Indians and the members and the estates of members of said tribe.

3. That said decedent was an unallotted full blood Osage Indian to whom no certificate of competency had ever been

issued, and that his entire estate was restricted under the laws of the United States. That Charles West, Jr., died September 2, 1940.

[fol. 21] 4. The assessment of the property of the Estate of said decedent is in conflict with the decision of the Supreme Court of the State of Oklahoma in the case of Childers v. Pope, 119 Okl. 300, 249 P. 726.

5. Protest is specifically made against the assessment upon the following items:

A. Upon the value of $24,294.55, representing the items set forth in Schedules A-1 and A-2 of the return filed herein by the administrator. This sum includes the value of 1 and 919/2520ths Osage Headrights owned by the decedent at the time of his death, which headrights represent an undivided interest in the oil, gas, coal and other minerals under all the lands in Osage County, Oklahoma, which interest was reserved to the Osage Tribe of Indians by Act of Congress approved June 28, 1906 (34 Stat. L. 539), and all of which is a trust duly established by the United States for the benefit of the said Osage Tribe of Indians and heirs of the members of said tribe, which has never been subjected to state taxation. The headrights in this case are valued [fol. 22] at $10,235.12. Your protestants show that the remaining value in this particular schedule of $14,459.43 is not includable in the net estate; it was land purchased for the decedent by the use of restricted trust funds which had accumulated to the credit of the decedent from his headrights; the remainder of said real estate was inherited by said decedent from various full blood restricted ancestors, including Osage restricted homestead, which was not and is not subject to state taxation.

B. Upon the inclusion in the net estate of the sum of $73,505.80 set forth in Schedule B under the item of stocks and bonds; said stocks and bonds were purchased by and in the name of the United States and are still so held for said decedent in the exercise of the authority vested in the Secretary of the Interior by Acts of Congress, the purchases having been made from funds accumulated from the aforementioned Osage headrights; said funds and said stocks and bonds at all times since the acquisition thereof having been held by the Secretary of the Interior and never subjected to state taxation.

C. Upon the inclusion in the net estate of propert, set forth in Schedule C in the amount of $34,926.69, (a) cash, $29,445.17, which represents the accruals from the Osage [fol. 23] headright payments as aforementioned, (b) $736.00 represents certain items of personal property which were purchased with funds accruing to the Osage headrights, and (c) the remainder of $4,745.52 represents the trust funds in the hands of the Treasurer of the United States, being decedent's share in the proceeds of the sale of the Osage Tribe's lands in Kansas, and which were credited to each Osage Indian, which have never been subjected to state taxation.

That under the express provisions of the Act of Congress approved March 2, 1929, (45 Stat. 1478) each and all of the aforesaid items of property belonging to said estate have heretofore been held and still continue to be held in trust by and subject to the supervision of the United States.

D. In the order assessing tax, total deductions of $6,507.86 have been allowed by your Honorable Commission. If this estate is ultimately found to be subject to tax, additional deductions authorized by law have not been taken into account, and an adjustment should be made thereon.

6. No authority has ever been granted by the Congress of the United States to the State of Oklahoma to levy a [fols. 24-25] tax upon the transfer of property owned by deceased Osage Indians.

Wherefore, your protestant requests an oral hearing before the Oklahoma Tax Commission and prays that the order assessing the tax entered herein on September 20, 1943, and notice of which was mailed to your protestant on September 28, 1943, be vacated, set aside and held for naught.

Mary Morton West, Protestant, by Frank T. McCoy,
John T. Craig, John R. Pearson, Her Attorneys.

[fol. 26] [File endorsement omitted]

BEFORE THE OKLAHOMA TAX COMMISSION

Oklahoma City, Oklahoma

Probate No. 4664, Osage County Court

In the Matter of the Assessment of Estate Taxes Against the ESTATE OF CHARLES WEST, JR., Deceased

STIPULATION AS TO CERTAIN FACTS—Filed July 13, 1944

Comes now Mary Morton West, Osage Allottee No. 192, protestant herein, by her attorneys Frank T. McCoy, John T. Craig, John R. Pearson, and Frank Mahan, and the Oklahoma Tax Commission of the State of Oklahoma, by its attorneys E. L. Mitchell, A. L. Herr and C. W. King, and stipulate and agree as follows:

1

That the Oklahoma Tax Commission was created by the laws of the State of Oklahoma, and, beside other things, was given the power and charged with the duty of assessing and collecting inheritance tax laid under the laws of the State of Oklahoma.

2

[fol. 27] That Charles West, Jr., was a restricted, full blood, adult unallotted Osage Indian, who died intestate September 2, 1940, while domiciled in and a resident in good faith of the State of Oklahoma where he had lived all his life; that no certificate of competency had ever been issued to him; that the said decedent left surviving him his mother, Mary Morton West, who is a full blood restricted Osage Indian and to whom his entire estate passed as his sole heir at law, except for an amount paid deceased's widow.

3

That all of the property and estate left by Charles West, Jr., is restricted property in the possession and under the control of the United States acting through the Secretary of the Interior.

4

That the United States retained in a separate account sufficient funds to pay the inheritance taxes, if any be finally adjudged to be due in this case. That Osage funds are paid to the United States Treasury and held by it undesignated as to members of Tribe but simply as the Osage Tribal Trust Fund.

5

That no penalty or interest be charged or collected for any time prior to thirty days subsequent to the recording [fol. 28] of the mandate after final decision herein.

6

That at the death of Charles West, Jr., he owned:

(a) 1 and 919/2520ths Osage Indian Mineral headrights, $10,235.12

(A mineral headright is the undivided 1/2229 part of all minerals in Osage County, Okla., formerly the Osage Nation, title to which minerals has been, is and will be held in trust by the United States until 1984 or such further time as Congress may provide—Globe Indemnity Co. v. Bruce, 81 F. (2d) 143, 1. c. 147-150, and has never been subjected to taxation.)

(b) Trust funds in U. S. Treasury, Accrued interest thereon ..... $ 4,745.52

(These funds have been held by the United States since before the Act of 1906, 34 Sta. 539, and have never been subjected to taxation.) .. 398.90

(c) Surplus funds in U. S. Treasury, ... $29,046.27

(Accumulated from bonus, royalty and rent from Osage Mineral Headrights, land rents and interest.)

(never subjected to taxation)

(d) United States bonds, value at death $70,949.31

(Purchased with restricted funds and held by the United States in its Treasury from funds accumulated as in (c) (Never subjected to taxation)

[fol. 29] (e) Building & Loan Stock, (Never subject to taxation) (Same as (d)) ..... $ 1,485.06

(f) Real estate other than homestead in Osage County, Oklahoma, inherited by deceased from restricted Osage Indians, (Restricted) Taxed.. $12,226.10

(g) 3/28ths interest in Masonic mortgage (Same as (d)) ..... $ 1,071.43

(h) Real estate in Osage County, Okla., purchased by United States with funds as in (c) Homestead. (Restricted) Taxed. ..... $ 5,000.00

(i) Real estate in Osage County, Okla. exempt from taxation under Osage acts as homestead (Restricted). ..... $ 1,833.33

(j) Restricted household furniture, (in home in Osage Co.) (Purchased by funds in c.) (Not taxed). 736.00

7

That the Oklahoma Tax Commission valued this estate at $132,727.04 gross, less deductions $21,507.86, including the basic $15,000.00 exemption, leaving subject to tax $111,-219.18 and assessed a tax thereon of $4373.15 and penalty of $940.20 making a total of $5,313.35. That such order was made on September 20, 1943, and notice given September 29, 1943.

8

That the only funds or property coming into the Adminis-[fol. 30] trator's hands was the sum of $5,606.50 released by the United States to him with which to pay claims and expenses of administration after approval of said claims by the Secretary of the Interior.

9

That said estate was retained by the United States in trust as theretofore after the final decree determining heirs dated July 13, 1942, except for homestead in City of Fairfax, exempt household furniture and the sum of $15,000.00 paid widow under contract settling heirship contest, which contract was approved by the Secretary of the Interior.

10

That the per capita payments to or for the original 2229 enrolled Osages or divided among their heirs for the calendar years in which the largest and smallest payments were made since they became of material size and for the year of the death of Charles West, Jr., are:

1924	$12,000.00
1933	598.00
1940	945.00

In 1940 these 2229 payments were divided among 4,087 [fols. 31-32] allottees and heirs of deceased allottees.

11

That each party reserves the right to introduce further testimony and evidence which is not inconsistent with the facts herein stipulated.

Dated this 1st day of July, 1944.

Mary Morton West, Protestant, by Frank T. McCoy, John T. Craig, John R. Pearson, Frank Mahan, her Attorneys; Oklahoma Tax Commission by E. L. Mitchell, A. L. Herr, C. W. King, its Attorneys.

[fol. 33] (File endorsement omitted)

BEFORE THE OKLAHOMA TAX COMMISSION

No. 1743

In the Matter of the Assessment of Estate Taxes against Charles West, Jr., deceased.

FINAL ORDER—Filed August 14, 1944

This cause coming on for hearing before the Oklahoma Tax Commission on the 14th day of July, 1944, The Commission being present by the Chairman, J. Frank Martin and J. D. Dunn, Vice Chairman; protestant appearing by its attorneys, Frank T. McCoy of Pawhuska, Oklahoma, and Frank Mahan of Fairfax, Oklahoma; and the Oklahoma Tax Commission appearing by Walter Harris, Director of the Inheritance and Estate Tax Division, and the Com-

mission being represented by E. L. Mitchell, A. L. Herr and C. W. King of the Legal Division, said Commission, after hearing the protest of the taxpayer and after having examined the returns of the taxpayer, the appraisement of the estate and property and assets of the said estate of Charles West, Jr., deceased, and after considering all of the evidence in the case takes said case under advisement; there- [fol. 34] after and on the 14 day of August, 1924, said Commission finds that each and all of the items mentioned in the stipulation of facts, save and except the inherited tax exempt Osage homestead, should be included in this gross estate and taxed under the Oklahoma inheritance, transfer and estate tax statutes, Title 68, Section 989, (a) to (t) inclusive, O. S. 1941.

That there is due as transfer, inheritance and estate taxes from the estate of the said Charles West, Jr., deceased, the amount of $4,263.15 and interest at the rate of 1 per cent per month thereon from the 2nd day of December, 1941.

It is the judgment and opinion of the Commission that if the amount of tax finally decreed to be due the State of Oklahoma from this estate shall be paid within 30 days from the recording of the mandate of the court in case of appeal from this order, that no interest or penalty should be charged.

It is, therefore, ordered, adjudged and decreed, by The Oklahoma Tax Commission that transfer, inheritance and estate taxes in the amount of $4,263.15 is hereby assessed against the said estate of Charles West, Jr., deceased, and ordered to be paid to the Oklahoma Tax Commission by [fol. 35] the said estate; that if said tax is paid within 30 days from the final judgment of the Commission or the recording of the mandate of the court in case of appeal, then no interest or penalty shall be assessed or collected; that if said tax is not paid within said time, there shall be paid the additional amount due as interest at the rate of 1 per cent per month from the 2nd day of December, 1941, to date of final payment.

Exception to this order having been taken by the taxpayer and notice of appeal to the Supreme Court of Oklahoma from this judgment and order of assessment having been given, this judgment and order shall be held in abeyance and shall be non-operative for a period of 30 days from date, and if appeal shall have been perfected to the

Supreme Court of the State of Oklahoma within said time, then said judgment shall be further held in abeyance until the final determination of the controversy by the court of last resort to which said cause shall be appealed.

Dated this 14 day of August, 1944.

Oklahoma Tax Commission, by —— ——, Chairman
J. D. Dunn, Vice Chairman; R. H. Sibley, Member.

Attest:
H. D. Canfield, (Seal) Secretary.

Approved:

Frank T. McCoy, Attorney for Taxpayer; C. W. King, Attorney for the Oklahoma Tax Commission.

[fol. 36] I do hereby certify that the above and foregoing is a true copy of the original document now on file in my office. Witness my hand and official seal of The Oklahoma Tax Commission this 14 day of August, 1944.

H. D. Canfield, Secretary, Oklahoma Tax Commission
(Seal.)

[fol. 37] [File endorsement omitted]

BEFORE THE OKLAHOMA TAX COMMISSION, OKLAHOMA CITY, OKLAHOMA

Case No. 1743

In the Matter of the Assessment of Estates Taxes against the ESTATE OF CHARLES WEST, JR., Deceased Unallotted Osage

Probate No. 4664 Osage County Court

NOTICE OF APPEAL—Filed August 19, 1944

To the Honorable Oklahoma Tax Commission:

You are hereby notified that the undersigned Mary Morton West, Osage Allottee No. 192, protestant herein, elects to appeal to the Supreme Court of the State of Oklahoma from the order of the Oklahoma Tax Commission entered herein on the 14th day of August, 1944, purporting to fix and determine the net value of the estate of the above named deceased and to compute and assess all inheritance,

estate and transfer taxes thereon, and for grounds of said appeal, among others, states:

1. That no tax is due under the decision of the Supreme Court of Oklahoma in the case of Childers v. Pope, 119 Okl. 300, 249 Pac. 726, or at least not the amount assessed.

2. That the aforesaid statute and the order of the Oklahoma Tax Commission herein violate the 14th Amendment [fol. 38] to the Constitution of the United States by imposing an estate tax on this estate or a part thereof which is constitutionally immune therefrom and abridge and deny this protestant privileges and immunities guaranteed to her by the Constitution of the United States, the Osage treaties and laws, and deprive her of her propery without due process of law and the equal protection of the law.

3. That said state act and the order of the Oklahoma Tax Commission herein, in violation of the 14th Amendment to the Constitution of the United States, Osage treaties and laws, impose an inheritance and transfer tax which includes in its measure property which protestant does not receive, to-wit: (a) the value of the corpus of the undivided portion of the minerals in and under Osage County held by the United States in trust for the Osage Tribe of Indians, from which decedent during his life was permitted to receive a part of the income; (b) the value of a portion of the Osage Trust Fund determined and held by the United States, from which the decedent during his life was permitted to receive a part of the interest thereon; (c) a fractional part of the money from Osage tribal minerals received and held in trust by the United States for the Osage Tribe after payment therefrom to the decedent during his lifetime of certain annuities as provided by law.

[fol. 39] 4. That said state act and the order of the Oklahoma Tax Commission herein, in violation of the Constitution of the United States, Osage Treaties and laws, impose on protestant an inheritance and transfer tax which includes in its measure property of the United States and property held by the United States in trust for the Osage Tribe of Indians in which decedent and this protestant had and have no individual vested property interest.

5. That said state act and the order of the Oklahoma Tax Commission herein, contrary to the 14th Amendment to the Constitution of the United States, Osage Treaties and laws, impose on protestant an inheritance and transfer tax which

includes in its measure property held in trust by the United States long prior to the admission of the State of Oklahoma into the Union and the enactment of its first inheritance and estate tax law, and under which trust no transfer thereof took place upon the death of decedent.

6. That said state act and the order of the Oklahoma Tax Commission herein would interfere with and defeat the United States in performing its governmental duty to the Osage Tribe of Indians, including this protestant, and diminish the trust estate, contrary to Osage treaties and laws, which trust estate is to be delivered by the trustee [fol. 40] to the remaindermen in 1983.

7. That the title to part of said property included in the measure of said tax is in the United States and is constitutionally immune from state taxation.

8. That if any property right passed at the death of the decedent to this protestant, it did so by virtue of federal law and not by state law.

9. That said state act and the order of the Oklahoma Tax Commission herein violate the rights of protestant and of the United States under Section 8 of Article 1 of the Constitution of the United States relating to commerce with the Indian Tribes.

10. That said state act and the order of the Oklahoma Tax Commission herein violate Section 1 of the Enabling Act (34 Stat. L. 267-278) of the State of Oklahoma.

11. That by reason of Constitutional immunity, said minerals, trust fund and proceeds from said minerals held by the United States in trust for the Osage Tribe have never been subjected to state taxation.

12. That Congress has never granted authority to the State of Oklahoma to levy a tax upon the transfer of property held in trust by the United States for the Osage Tribe [fol. 41] of Indians.

Wherefore said protestant prays that this notice of appeal be filed and made a part of the record in this case and that the said Oklahoma Tax Commission upon this, her request, prepare and furnish to said protestant proper and complete certified record in this cause as required by Title 68, Section 1474, O. S. 1941, so that this protestant may file said original with her petition in error attached thereto

with the Clerk of the Supreme Court within the time provided by said statute.

Mary Morton West, Protestant, by Frank T. McCoy, John T. Craig, John R. Pearson, Frank Mahan, her attorneys.

[fol. 42] Thereafter, and on the 17th day of August, 1944, the Oklahoma Tax Commission received of Mary Morton West, by her attorneys, Frank T. McCoy, John T. Craig, John R. Pearson and Frank Mahan, the sum of $4,263.15, the amount of tax assessed by the Oklahoma Tax Commission. Certificate of Acknowledgment of such payment is as follows:

[fol. 43]

McCoy, Craig & Pearson,

Attorneys at Law

Pawhuska, Oklahoma

Aug. 16, 1944

Oklahoma Tax Commission, State Capitol Office Building, Oklahoma City, Oklahoma.

In re: Charles West, Jr., Estate Tax, Probate No. 4664, Osage County, Oklahoma

GENTLEMEN:

We hand you herewith the sum of $4,263.15 out of said estate, being the amount of the tax assessed by you against the above estate. This tax is being paid under protest and after notice of appeal in this case and is to be held by the Tax Commission in a segregated fund pending the final determination of this cause and subject to distribution thereafter as provided by Title 68, Section 1474 O. S. 1941.

Protestant respectfully requests that you show in the certified record for the appeal of this case that the tax so assessed has been paid. Acknowledgment of receipt hereof will be appreciated.

Your very truly, Mary Morton West, Protestant, by Frank T. McCoy, John T. Craig, John R. Pearson, Frank Mahan, her attorneys.

FTM:F.
Enc.

[fol. 44] OKLAHOMA TAX COMMISSION, STATE OF OKLAHOMA
CERTIFICATE OF ACKNOWLEDGMENT

Re: Estate Tax—Charles West Jr., Deceased. Probate No. 4664. Osage County, Oklahoma

This is to certify that the records of this office disclose that on the 17th day of August, 1944, there was paid the sum of $4,263.15 in full satisfaction of Estate, Inheritance and Transfer taxes due the State of Oklahoma in the above estate, such payment being made under protest and subject to outcome of appeal from Commission's order.

Witness our hand and seal of office this 19th day of August, 1944.

Oklahoma Tax Commission, by J. Frank Martin, Chairman.

Attest: H. D. Canfield, Secretary. (Seal.)

Approved: Walter Harris, Director Estate & Inheritance Tax Division.

[fol. 45] Secretary's Certificate to foregoing transcript omitted in printing.

[fol. 46] [File endorsement omitted]

IN THE SUPREME COURT OF OKLAHOMA

No. 31947

FLOYD O. YARBROUGH, Executor of the Estate of Dora Neal Rector, Osage Allottee No. 626, Deceased, Fred Rector, Kathleen Rector, Opal Rector, and Arthur B. Rector, Plaintiffs in Error,

vs.

OKLAHOMA TAX COMMISSION, Defendant in Error

No. 31948

MARY MORTON WEST, Osage Allottee No. 192, Plaintiff in Error,

vs.

OKLAHOMA TAX COMMISSION, Defendant in Error

STIPULATION FOR CONSOLIDATION—Filed September 26, 1944

It is hereby stipulated by and between the parties hereto that the above entitled causes may be consolidated for the purpose of briefing and oral argument in this Court.

The parties respectfully represent to the Court that the above entitled causes are complementary and that the two together present the necessary facts and questions of law [fol. 47] for a complete adjudication of the issues involved; that neither case could be properly briefed or argued alone. That counsel believe it will be of assistance to the Court as well as to counsel for this order to be entered and said cases briefed and argued together.

Dated this 19th day of September, 1944.

Frank T. McCoy, John T. Craig, John R. Pearson, Frank Mahan, Attorneys for Plaintiff in Error.
A. L. Herr, E. L. Mitchell, C. W. King, Attorneys for Defendant in Error.

[fol. 48] [File endorsement omitted]

IN THE SUPREME COURT OF OKLAHOMA

ORDER CONSOLIDATING CAUSES—Filed October 10, 1944

The Clerk is hereby directed to enter the following orders: October 10, 1944.

31,947: Yarbrough, Exr., etc. v. Oklahoma Tax Commission.

31,948: Mary Morton West, etc. v. Oklahoma Tax Commission. Ordered that the above styled and numbered causes be consolidated for the purposes of briefing and oral argument. Motion to advance granted; oral argument to be heard at a date to be set by the Court.

N. S. Corn, Chief Justice. Vivian S. Payne, Clerk.

[fol. 49] [File endorsement omitted]

IN THE SUPREME COURT OF OKLAHOMA

No. 31947

FLOYD O. YARBROUGH, Executor of Estate of Dora Neal Rector, Deceased, Plaintiff in Error

vs.

OKLAHOMA TAX COMMISSION, Defendant in Error

and

No. 31948

MARY WEST, Plaintiff in Error,

vs.

OKLAHOMA TAX COMMISSION, Defendant in Error

SYLLABUS

The estates of deceased, fullblood, restricted, Osage Indians, except the allotted homestead, are subject to the estate, or transfer, or inheritance tax levied by the State of Oklahoma under the provisions of 68 O. S. 1941, secs. 988 et seq.

Appeal from the Oklahoma Tax Commission affirmed.

[fol. 50] Frank T. McCoy, John T. Craig, John R. Pearson, Pawhuska, Oklahoma; Frank Mahan, Fairfax, Oklahoma, for Plaintiffs in Error.

E. L. Mitchell, C. W. King, Oklahoma City, Oklahoma, for Defendant in Error.

OPINION—Filed June 18, 1946

BAYLESS, J.:

This appeal from the Oklahoma Tax Commission involves only the issue of the power of the State of Oklahoma to levy and collect an estate, transfer, and inheritance tax under 68 O. S. 1941, secs. 988 et seq., in the estate of Dora Neal Rector, deceased, who was a fullblood, allotted restricted Osage Indian. This person died leaving an estate consisting of (1) allotted homestead land; (2) allotted surplus land and land inherited from other Osages; (3) 2 and 13/252nds Osage Mineral Headright interests; (4) cash in the hands of the United States Treasurer derived from the income from the headright interests; and (5) cash in the hands of the United States Treasurer representing her share of the sale price of tribal lands in Kansas. It is conceded the allotted homestead is non-taxable and the Commission made no order taxing it under the above statute. The executor of Rector's estate appeals. There is a similar appeal [fol. 51] on the identical issue by the representative of the estate of Charles West, Jr., a deceased minor, unallotted Osage Indian, whose estate consisted of (1) 1 and 919/2520ths Osage Mineral Headright interests; (2) land purchased with funds derived from the headright interests and land inherited from other Osages; (3) cash in the hands of the United States Treasurer representing accruals of income from the headright interests; (4) personal property purchased with funds derived from the headright interests; and (5) cash in the hands of the United States Treasurer representing his share of the sale price of tribal lands in Kansas. These appeals are consolidated for presentation to us and decision. In addition to the briefs of the parties, briefs amicus curiae have been filed.

The methods of stating and treating the various law issues differ in these briefs, but essentially they all coincide on certain issues that determine the controversy. We shall treat these issues in an arrangement that tends to

our convenience but does not overlook any aspect of the vital issues raised.

Before directing our attention to the specific issues argued, we will discuss an aspect of these cases that inheres in the position of appellants and is an assumption that underlies virtually all of their arguments. It is both asserted and implied that there is no reason, and there should be no disposition on the part of this court, to delve into [fol. 52] this issue again. Briefly the main issue can be stated thus: No tax is due under an earlier decision of this court. See Childers v. Pope, 119 Okl. 300, 249 P. 726. In that case it was held that the portion of the estate of a restricted Indian consisting of land and mineral interests was not taxable under Oklahoma law. However, this holding was not original with this court; there is no language in it that manifests a concurrence in the rationale of the rule adopted, and it is obvious the opinion was forcedly adopted by the controlling circumstance of an intervening opinion by the Supreme Court of the United States. See Childers v. Beaver, 270 U. S. 555, 70 L. Ed. 730 (7). It will be observed in reading the Childers v. Pope opinion that this court remarked it was "not disposed to go further than the rule therein announced." (Beaver, supra), and expressly made subject to Oklahoma's taxing power, as an exception to the rule of the Beaver case, the personal property of the estate. The Beaver decision, as it related to land and mineral interests, was based on two grounds: (1) Such property descended by federal and not state law, and (2) The restrictions under which the federal government held some of the property of all Indians and all of the property of some Indians constitute a federal instrumentality that would be interfered with if subjected to state taxation. One of the best of reasons for again going into this issue, since our independent judgment was obstructed earlier, is the recent review and revision by the Supreme Court of the [fol. 53] United States of the rules of law of the earlier federal decisions on this branch of the law. The traditional federal court view of the non-taxability of the property of Indians is illustrated by U. S. v. Rickert, 188 U. S. 432, 47 Law Ed. 532 and Childers v. Beaver, supra. The alteration in this view is disclosed by Shaw v. Gibson-Zahniser Oil Corp., 276 U. S. 575, 72 Law Ed. 709; Supt. etc. v. Comm. Int. Rev., 295 U. S. 418, 79 Law Ed. 1517; U. S. v. Oklahoma Tax Commission, 131 Fed. (2) 635; Helvering v.

Mountain Producers Corp., 303 U. S. 376, 82 Law Ed. 907; Oklahoma Tax Commission v. U. S., 319 U. S. 598, 87 Law Ed. 1612, and the various decisions discussed therein. It is not an unfair summary of the two views to say that earlier the federal court decisions provided an almost complete immunity from taxation in any form where it appeared that any degree of wardship was exercised by the federal government toward the Indian (and too frequently this immunity was spread over non-Indians in their contractual relations with Indian property), whereas, lately the Indians' immunity from taxation is not implied but must be rested upon some plain base, and it no longer spreads over their contractual privies. In reviewing the earlier decisions on the so-called "federal instrumentality" rule, the Supreme Court of the United States stated (Helvering v. Mountain Producers Corp., supra), "In the light of the expanding needs of State and Nation, the inquiry has been pressed [fol. 54] whether this conclusion has adequate basis; • • • and the distinctions thus maintained have attenuated its teaching and raised grave doubt as to whether it should longer be supported,". In Oklahoma Tax Commission v. U. S., Supra, it was stated the instrumentality rule announced in the Beaver case, supra, "was in effect overruled." Thus if the Beaver opinion stood on no other basis than the instrumentality rule, it would no longer bar the State of Oklahoma in its effort to collect the tax involved. This alteration is sufficient justification for the State's renewed effort, an effort regarded as serious and persistent in the opinion in Oklahoma Tax Commission v. U. S., supra.

Previously we mentioned that the Beaver opinion stated, in addition to the instrumentality rule, another reason why the State of Oklahoma could not levy and collect the tax involved and this other reason is also urged against the State, with great stress, in the briefs. In short, as said in that opinion, "Apparently appellan*d* supposed that the land passed to the heirs by virtue of the laws of the State and were subject to the inheritance taxes which she laid. • • • The land really passed under a law of the United States, and not by Oklahoma's permission." Adopting this language and the language of the various Osage Acts and the decisions of the courts on a variety of issues arising thereunder, as well as other Indian laws, it is urged (1) that no title to this property ever vested in the Osages

but the title remains yet in the Federal government and thus [fol. 55] is not taxable, or (2) if title actually vested in the individual Osages, the devolution thereof is by virtue of Federal and not State law, thus depriving Oklahoma of the power to tax the transitus of this property from the Osage Indian to his heir or devisee.

We reject at once as untenable the assertion that the title to this property remained in the Federal government under the various laws applicable to the Osages. Globe Indemnity Co. v. Bruce, 81 Fed. (2d) 143, and In re Martin's Estate, 183 Okl. 177, 80 P. 2d 561. It will not serve any purpose useful to a decision in this matter to undertake to determine precisely what aspect of title remained in the Federal government or was assumed by it as an instrumentality to further its supervision of and duty toward Osage Indians under the restrictive terms of the allotment laws and subsequent laws. The case of Oklahoma Tax Commission v. U. S., supra, definitely establishes the rule that the levying of a tax such as this on the devolution of property similarly affected does not interfere with the Federal government. There is a distinct difference between the situation of Osage Indians and their property, under the Acts applicable to them, and the allottee and the property involved in U. S. v. Rickert, 188 U. S. 432, 47 Law Ed. 532, as is pointed out in Oklahoma Tax Commission v. U. S. supra, Osage Indians are full citizens of the State of Oklahoma. Osage Indians have title to their allotments, to their aliquot parts of the mineral headright interests, and land sale trusts, and the accumulations from these [fol. 56] sources in the Federal treasury. These properties are identifiable, subject to Constitutional and statutory protection, derive benefits for their owners, and pass by law at death. The title, if such it may be called, that rests in the Federal government is a mere instrument for service, whereas the title in the Indians is an individual, beneficial, and valuable thing.

We accept as final and binding upon us the rule in the Beaver case, above, that devolution of this property is by Federal and not State law. However, we cannot accept as logical the rule that because this is so, Oklahoma has no power to tax the transitus, either as an incident or with respect to the rights coincident therewith or arising therefrom. It is pointed out by the State that the Federal government levies an inherit-

ance tax on non-Indian citizens of Oklahoma although the devolution and transitus are by virtue of Oklahoma law. It is generally recognized that the Federal Constitution is the supreme law of the land, and within the Federal field, Federal statutes control and no State authority exists or can intrude, and likewise for the State Constitution and its statutes. No one would contend that Federal authority exists to direct or interfere with Oklahoma's power to legislate on descent and distribution with respect to non-Indian citizens. Oklahoma may permit or forbid the devising or [fol. 57] inheriting of property within its borders; it may permit succession on such terms as it chooses, and by what system. No Federal control may apply. If it is this power that gives rise to the right to levy an inheritance or succession tax, as indicated in the Beaver opinion, it may, with some degree of logic be asked by what authority does the Federal government tax our citizens in such instances?

Reconsideration of this problem caused the Supreme Court of the United States to say, in Oklahoma Tax Commission v. U. S., above:

> "It is true that our interpretation of the 1933 statute must be in accord with the generous and protective spirit which the United States properly feels toward the Indian wards, but we cannot assume that Congress will choose to aid the Indians by permanently granting them immunity from taxes which they are as able as other citizens to pay. It runs counter to any traditional concept of the guardian and ward relationship to suppose that a ward should be exempted from taxation by the nature of his status, and the fact that the federal government is the guardian of the Indian ward is no reason, by itself, why a state should be precluded from taxing the estate of the Indian. We have held that the Indians, like all other citizens, must pay federal income taxes. Superintendent of Five Civilized Tribes v. Commissioner of Internal Revenue, supra (295 U. S. [fol. 58] 421, 79 Law Ed. 1520, 55 S. Ct. 820). ('Wardship with limited power over his property' did not there 'without more render (the Indian) immune from the common burden'. A federal court has held, in a well reasoned decision defended before us by the Solicitor General of the United States, who is not a party to this action, that an Indian's estate is subject to the federal

estate tax. Landman v. Commissioner of Internal Revenue (CCA 10th) 123 F. (2d) 787. Congress cannot have intended to impose federal income and inheritance taxes on the Indians and at the same time exempt them by implication from similar state taxes. "Congress has passed laws under which Indians have become full-fledged citizens of the State of Oklahoma. Oklahoma supplies for them and their children schools, roads, courts, police protection and all the other benefits of an ordered society. Citizens of Oklahoma must pay for these benefits. If some pay less, others must pay more."

All of this is summed up in that opinion in these words: "Recognizing that equality of privilege and equality of obligation should be inseparable associates, we have recently swept away many of the means of tax favoritism." [fol. 59] In that opinion reference was made to the fact the federal government is collecting from Indian wards an income tax and an estate tax. In this appeal, our attention has been called to the fact that the federal government collects an estate tax on Osage estates. The Treasury Department's act in collecting such tax is based upon (1) the nature of the title of the Osage Indian and (2) the power of the Osage Indian to pass this property at his death. There is nothing in any of the decisions called to our attention that indicates that a power to levy an estate tax in the case of its Indian wards that is not possessed by the State of Oklahoma. As we understand the rule of immunity from taxation by reason of the wardship exercised by the federal government over Indians, including restrictions on alienation, it means a lack of power in either government to tax, not simply that the federal government has such power and Oklahoma has not.

If the title to this property yet remains in the federal government, as contended by appellants, that government certainly would not tax its own property. Yet the record and decisions disclose that the federal government does exact an estate tax in these and similar instances. If the federal government does not regard its position as guardian of the Indians as a bar to its exacting income and estate taxes from the Indians, it is a reasonable assumption that it does not look upon the protective restrictions placed around the Indians' property as affording tax immunity. The Supreme

Court of the United States said in Oklahoma Tax Commis-
[fol. 60] sion v. U. S. above, in referring to earlier federal court decisions establishing and extending tax immunity in favor of the Indian and his privies: "*None of these cases* hold, nor has this court ever decided, that congressional restriction of an Indian's income carried an implication of estate Tax exemption. * * * The immunity formerly said to rest on constitutional implication cannot now be resurrected in the form of statutory implication. * * * If congress intends to prevent the State of Oklahoma from levying a general non-discriminatory estate tax applying alike to all of its citizens, it should say so in plain words. Such a conclusion cannot rest on dubious inferences. 'Nontaxability and restrictions upon alienation are distinct things.' "

While this last cited and quoted case involved the estates of Creek Indians whose allotments and restrictions on alienation and the management of property rest on different laws, the general tone of the court's language in that decision clearly support the Oklahoma Tax Commission in this case.

The Order of the Oklahoma Tax Commission is affirmed.

Concur: Riley, Osborn, Welch, Corn, and Davison, JJ:

Dissent: Hurst, V. C. J.

[fol. 61] [File endorsement omitted]

IN THE SUPREME COURT OF OKLAHOMA

[Title omitted]

PETITION FOR REHEARING—Filed July 1, 1946

[fol. 62] Come now the plaintiffs in error in the above-entitled consolidated causes, and respectfully represent and show to the Court that on June 25, 1946, an opinion was handed down by this Court affirming the judgment and order of the Oklahoma Tax Commission assessing estate, transfer or inheritance taxes against the estates involved in said proceedings. Said plaintiffs in error respectfully show to the Court that said opinion and decision is unsound and

untenable upon the following grounds and for the following reasons, to wit:

1. Said opinion incorrectly states that the main issue in said appeals is whether or not the same are governed by the case of Childers v. Pope, 119 Okl. 300, 249 P. 726.

[fols. 63-64] 2. Said opinion incorrectly assumes the right of the federal government to collect an estate or inheritance tax upon Osage property.

3. Said opinion fails to give proper consideration to the proposition that estates of non-Indian citizens held under trusts comparable to the trust in which Osage estates are held are not subject to transfer, estate or inheritance taxes.

4. Said opinion overlooks the fact that the Federal government has never granted to the State of Oklahoma the right to levy the tax in question, as it did in the case of the Gross Production Tax on Osage minerals and in the case of "all State and Federal taxes" upon minerals of citizens of the Five Civilized Tribes.

5. The opinion fails to apply the well-settled principle of statutory construction, that re-enactment of legislation after judicial construction indicates legislative approval of such construction.

Wherefore, plaintiffs in error pray that a rehearing be granted herein, and that upon such rehearing due consideration be given to the propositions above mentioned.

Frank T. McCoy, John T. Craig, John R. Pearson, All of Pawhuska, Oklahoma; Frank Mahan, Fairfax, Oklahoma, Attorneys for Plaintiffs in Error.

[fol. 65] [File endorsement omitted]

IN THE SUPREME COURT OF OKLAHOMA

No. 31947

FLOYD O. YARBROUGH, Executor of Estate of Dora Neal Rector, Deceased, Plaintiff in Error,

vs.

OKLAHOMA TAX COMMISSION, Defendant in Error

and

No. 31948

MARY WEST, Plaintiff in Error

vs.

OKLAHOMA TAX COMMISSION, Defendant in Error

SYLLABUS

1. The estates of deceased full-blood, restricted Osage Indians, except the allotted homestead, are subject to the estate, or transfer, or inheritance tax levied by the State of Oklahoma under the provisions of 68 O. S. 1941, Sec. 988, et seq.,

2. Our former decision in the case of In re Estate of Nah-Me-Tse-He- Childers v. Pope, 119 Okla. 300, 249 Pac. 726, is hereby expressly overruled in so far as that decision [fol. 66] announces the rule that all of the estate of a deceased Osage Indian is exempt from the estate or inheritance tax authorized and levied by this state. The overruling of such decision subject however to the following provisions of prospective application only as to assessment and collection of such tax on other estates to the extent stated in the opinion.

3. A court of final decision, in overruling a prior adopted principle established by its own earlier decisions, may ordinarily in its discretion preserve in the overruling opinion all rights accrued under the prior declaration, the same as if they had been created or arose out of a former existing statute later repealed by the Legislature.

4. This opinion shall operate prospectively only as to assessment and taxation of property of other estates affected hereby in the manner stated in the body of the opinion and for the reasons therein stated.

Appeal from the Oklahoma Tax Commission by Floyd O. Yarbrough, executor of estate of Dora Neal Rector, deceased, and by Mary West. Appeals consolidated.

Affirmed.

[fol. 67] Frank T. McCoy, John T. Craig, and John R. Pearson, all of Pawhuska, and Frank Mahan of Fairfax, Oklahoma, for Plaintiffs in Error.

E. L. Mitchell and C. W. King, both of Oklahoma City, Okla., for Defendant in Error.

OPINION—Filed October 28, 1947

BAYLESS, J.:

These appeals from the Oklahoma Tax Commission involve only the issue of the power of the State of Oklahoma to levy and collect an estate, transfer, and inheritance tax under 68 O. S. 1941, Sec. 988, et seq. on the estates involved. Dora Neal Rector, a full-blood, allotted, restricted Osage Indian, died leaving an estate consisting of (1) allotted homestead land; (2) allotted surplus land and land inherited from other Osages; (3) 2 and 13/252nds Osage mineral headright interests; (4) cash in the hands of the United States Treasurer derived from the income from the headright interest; and (5) cash in the hands of the United States Treasurer representing her share of the sale price of tribal lands in Kansas. It is conceded the allotted homestead is nontaxable and the Commission made no order taxing it under the above statute. Charles West, Jr., a deceased minor, unallotted Osage Indian, left an estate con-
[fol. 68] sisting of (1) 1 and 919/2520ths Osage mineral headright interests; (2) land purchased with funds derived from the headright interests and land inherited from other Osages; (3) cash in the hands of the United States Treasurer representing accruals of income from the headright interests; (4) personal property purchased with funds derived from the headright interests; and (5) cash in the hands of the United States Treasurer representing his share of the sale price of tribal lands in Kansas. These appeals are consolidated for presentation to us and decision. In

addition to the briefs of the parties, briefs amicus curiae have been filed.

Before directing our attention to the specific issues argued, we will discuss an aspect of these cases that inheres in the position of appellant and is an assumption that underlies virtually all of their arguments. It is both asserted and implied that there is no reason, and there should be no disposition on the part of this court, to delve into this issue again. Briefly the main issue can be stated thus: No tax is due under an earlier decision of this court, to-wit: Childers v. Pope, 119 Okla. 300, 249 Pac. 726.

In that case it was held that the portion of the estate of a restricted Indian consisting of land and mineral interests was not taxable under Oklahoma law. However, this hold-
[fol. 69] ing was not original with this court; there is no language in it that manifests a concurrence in the rationale of the rule adopted, and it is obvious the opinion was forcedly adopted by the controlling circumstance of an intervening opinion by the Supreme Court of the United States, to-wit: Childers v. Beaver, 270 U. S. 555, 70 L. ed. 730 (7). It will be observed in reading the Childers v. Pope opinion that the decision there was based solely on the rule of the Beaver case, supra, and in the Pope case this court remarked it was "not disposed to go further than the rule therein announced." (Beaver, supra), and expressly made subject to Oklahoma's taxing power, as, an exception to the rule of the Beaver case, the personal property of the estate.

One of the best of reasons for again going into this issue, since our independent judgment was obstructed earlier, is the recent review and revision by the Supreme Court of the United States of some of the rules of law of the earlier federal decisions on this branch of the law. The traditional federal court view of the nontaxability of the property of Indians is illustrated by United States v. Rickert, 188 U. S. 432, 47 L. ed. 532, and Childers v. Beaver, supra. The alteration in this view is disclosed by Shaw v. Gibson-Zahniser Oil Corp., 276 U. S. 575, 72 L. ed. 709; Supt. etc., v. Comm. Int. Rev., 295 U. S. 418, 79 L. ed. 1517; United States v. Oklahoma Tax Commission, 131 Fed. 2d 635;
[fol. 70] Helvering v. Mountain Producers Corp., 303 U. S. 376, 82 L. ed. 907; Oklahoma Tax Commission v. United States, 319 U. S. 598, 87 L. ed. 1612, and the various decisions discussed therein.

In Oklahoma Tax Commission v. United States, supra, it was stated: "Childers v. Beaver, 270 U. S. 555, 70 L. ed. 730, 46 S. Ct. 387, supra, was in effect overruled by the Mountain Producers Corp, decision." This alteration is sufficient justification for the state's renewed effort, an effort regarded as serious and persistent in the opinion in Oklahoma Tax Commission v. United States, supra.

We reject at once as untenable the assertion that the title to this property remained in the federal government under the various laws applicable to the Osages. Globe Indemnity Co. v. Bruce, 81 Fed. 2d. 143, and In re Martin's Estate, 183 Okla. 177, 80 P. 2d 561. It will not serve any purpose useful to a decision in this matter to undertake to determine precisely what aspect of title remained in the federal government or was assumed by it as an instrumentality to further its supervision of and duty toward Osage Indians under the restrictive terms of the allotment laws and subsequent laws. The case of Oklahoma Tax Commission v. United States, supra, definitely establishes the rule that the levying of a tax such as this on the devolution of property similarly affected does not interfere with the federal government. There is a distinct difference between the situation of Osage [fol. 71] Indians and their property, under the acts applicable to them, and the allottee and the property involved in United States v. Rickert, 188 U. S. 432, 47 L. ed. 532, as is pointed out in Oklahoma Tax Commission v. United States, supra. Osage Indians are full citizens of the State of Oklahoma. Osage Indians have title to their allotments, to their aliquot parts of the mineral headright interests, and land sale trusts, and the accumulations from these sources in federal treasury. These properties are identifiable, subject to constitutional and statutory protection, derive benefits for their owners, and pass by law at death. The title, if such it may be called, that rests in the federal government is a mere instrument for service, whereas the title in the Indians is an individual, beneficial, and valuable thing.

The Supreme Court of the United States said in Oklahoma Tax Commission v. United States, supra:

> "It is true that our interpretation of the 1933 statute must be in accord with the generous and protective spirit which the United States properly feels toward the Indian wards, but we cannot assume that Congress will choose to aid the Indians by permanently granting

them immunity from taxes which they are as able as other citizens to pay. It runs counter to any traditional concept of the guardian and ward relationship to suppose that a ward should be exempted from taxation by [fol. 72] the nature of his status, and the fact that the federal government is the guardian of the Indian ward is no reason, by itself, why a state should be precluded from taxing the estate of the Indian. We have held that the Indians, like all other citizens, must pay federal income taxes. Superintendent of Five Civilized Tribes v. Commissioner of Internal Revenue, supra, (295 U. S. 421, 79 L. ed. 1520, 55 S. Ct. 820). 'Wardship with limited power over his property' did not there 'Without more render (the Indian) immune from the common burden.' A federal court has held, in a well reasoned decision defended before us by the Solicitor General of the United States, who is not a party to this action, that an Indian's estate is subject to the federal estate tax. Landman vs. Commissioner of Internal Revenue (C. C. A. 10th) 123 F. 2d 787. Congress cannot have intended to impose federal income and inheritance taxes on the Indians and at the same time exempt them by implication from similar state taxes.

"Congress has passed laws under which Indians have become full-fledged citizens of the State of Oklahoma. Oklahoma supplies for them and their children schools, roads, courts, police protection and all the other benefits of an ordered society. Citizens of Oklahoma must [fol. 73] pay for these benefits. If some pay less, others must pay more."

All of this is summed up in that opinion in these words:

"Recognizing that equality of privilege and equality of obligation should be inseparable associates, we have recently swept away many of the means of tax favoritism."

In that opinion reference was made to the fact the federal government is collecting from Indian wards an income tax and an estate tax. In this appeal our attention has been called to the fact that the federal government collects an estate tax on Osage estates. The Treasury Department's act in collecting such tax is based upon (1) the nature of the title of the Osage Indian, and (2) the power of the Osage

Indian to pass this property at his death. There is nothing in any of the decisions called to our attention that indicates that the United States government has a power to levy an estate tax in the case of its Indian wards that is not possessed by the State of Oklahoma. As we understand the rule of immunity from taxation by reason of the wardship exercised by the federal government over Indians, including restrictions on alienation, it means a lack of power in either government to tax, not simply that the federal government has such power and Oklahoma has not.

If the title to this property yet remains in the federal government, as contended by appellants, that government certainly would not tax its own property. Yet the record and decisions disclose that the federal government does [fol. 74] exact an estate tax in these and similar instances. If the federal government does not regard its position as guardian of the Indians as a bar to its exacting income and estate taxes from the Indians, it is a reasonable assumption that it does not look upon the protective restrictions placed around the Indians' property as affording tax immunity. The Supreme Court of the United States said in Oklahoma Tax Commission v. United States, above, in referring to earlier federal court decisions establishing and extending tax immunity in favor of the Indian and his privies:

> "None of these cases held, nor has this court ever decided, that congressional restriction of an Indian's income carried an implication of estate tax exemption. • • • The immunity formerly said to rest on constitutional implication cannot now be resurrected in the form of statutory implication. • • • If Congress intends to prevent the State of Oklahoma from levying a general non-discriminatory estate tax applying alike to all of its citizens, it should say so in plain words. Such a conclusion cannot rest on dubious inferences. 'Non-taxability and restrictions upon alienation are distinct things.' "

While this last-cited and quoted case involved the estates of Creek Indians whose allotments and restrictions on alienation and the management of property rests on different laws, the general tone of the court's language in that decision clearly supports the Oklahoma Tax Commission in this case.

[fol. 75] Since our former decision in Childers v. Pope, supra, was based solely upon a following of the rule of Childers v. Beaver, supra, and since the Supreme Court of the United States in reviewing various former decisions has itself "in effect overruled" Childers v. Beaver, we are at liberty to depart from following it.

We conclude that the order of the Oklahoma Tax Commission should be affirmed, and this tax assessed against these estates to the extent heretofore stated.

The pronouncement of this rule and the overruling of Childers v. Pope, supra, constitutes a definite change in the application of this tax to certain property of estates. The result is that under this decision certain property of estates will be subject to this tax which under the former construction was not so taxable, and it is urged that we should restrict this rule change to prospective effect only as to other estates administered upon and closed prior to the effective date of this decision. Upon that point, we observe that the rule of our former decision, following Childers, v. Beaver, was established in 1926, and under that rule of non-liability of such estates to the tax here involved, it is a matter of common knowledge, as well as judicial knowledge that many estates have been administered upon and closed and titles vested with no thought that any such tax liability existed and without any demand for or effort to collect such a tax; and that the stability of titles might be grievously affected unless we set at rest, or permit to remain at rest, any question as to the liability of any such estates for any such tax. [fol. 76] It is suggested on the part of the Tax Commission that no intention exists to undertake to surmount the apparent difficulties and to seek to apply this rule of taxability to such estates heretofore closed. We fully agree with the thought that no such effort should be made, and to that end, and for the reasons stated, we deem it our duty, and clearly within our authority, to give the aforesaid prospective effect only to this change in such rule. See Oklahoma County v. Queen City Lodge No. 197, I. O. O. F. 195, Okla. 131, 156, Pac. (2d) 340, and the many authorities therein cited.

It is therefore adjudged that this rule change is adopted for only prospective application to other estates so as not to apply to other estates administered upon and closed prior to the date of this opinion. For the reasons stated,

and upon the consideration and conditions stated, the order of the Tax Commission is affirmed.

Davison, V. C. J. Bayless, Welch, Arnold and Luttrell, JJ: concur.

Riley, and Corn, JJ: concur in part and dissent in part, as to Prospective Operation Only.

Hurst, C. J. and Gibson, J. Dissent.

[fol. 77] [File endorsement omitted]

IN THE SUPREME COURT OF OKLAHOMA

[Title omitted]

DISSENTING OPINION—Filed October 28, 1947

HURST, C. J. (Dissenting):

Two questions inhere in this case, (1) may Oklahoma levy an estate tax upon the transmission of property, the legal title to which is vested in the United States, and which is held in trust for the benefit of an Indian tribe, where the only right of the deceased Indian allottee is to receive his aliquot portion of the income from the trust property as the United States government may from time to time elect to distribute it in the absence of an Act of Congress author-[fol. 78] izing such tax, and (2) did the Oklahoma Legislature intend to levy a tax upon the transmission of such right. I think both questions should be answered in the negative. We are not concerned with whether Congress should authorize such a tax to be levied, but rather whether it can be done without the consent of Congress.

1. The authorities relied upon in the majority opinion do not sustain the result reached. None of the cases relied upon involved a tax upon property held in trust by the United States for the benefit of its Indian wards. The Mountain Producers case, 303 U. S. 376, involved a tax upon the income of an oil and gas lessee of state lands, and it stands for the rule that the interest of the lessee is too remote to be protected from the levy under the rule exempting state instrumentalities from Federal taxation. The property involved in the other cases relied upon was owned in fee by the individual Indians, but the alienation of such

property was restricted. The Five Civilized Tribes case, 319 U. S. 598, recognizes the distinction between property owned in fee by individual Indians and property held in trust by the United States for their benefit, and cites United States v. Rickert, 188 U. S. 432, in making such distinction. The Rickert case has never been departed from. If, as there held, property held in trust by the United States for the Indian Allottee is not subject to state ad valorem taxa-
[fol. 79] tion without the consent of Congress, it would seem that the State cannot levy an estate tax on its transmission by the death of the allottee, without the consent of Congress.

Our decision should be based upon sound legal principles, and not upon what we understand to be the "tone" or trend of the recent decisions of the United States Supreme Court in other tax cases not involving the precise question here involved. After all it is the function of Congress and not that of the Courts to declare the policy of the United States with reference to its Indian wards. No remote Federal instrumentality is here involved, but rather the United States Government itself. Congress has not provided a method of collecting the tax and has not authorized those having the custody of the funds held in trust to disburse them for such purposes. 25 U.S.C.A. # 123 provides: "No money shall be expended from Indian tribal funds without specific appropriation by Congress." It is my view that until Congress expressly or by necessary implication authorizes the tax to be levied and collected, it cannot be done because of the implied immunity doctrine. The question of whether these headright interests are or may be taxed by the Federal Government is beside the point. The doctrine of implied immunity operates only to prevent one government from taxing the property or in-
[fol. 80] strumentalities of another government, and does not prevent a government from taxing its own property or instrumentalities. 61 C. J. 361, 371; 51 Am. Jur. 279.

2. Both this court and the Federal courts are committed to the rule that the descent of the property here involved is cast under the Federal statutes and not under the state statutes. See In re Pryor's Estate, — Okla. —, 181 P. 2d 979, and the cases there cited. Our estate tax statute purports to cover only such property of the decedent as passes "by will or the intestate laws of this State." 68 O. S. 1941 #989. Estate and inheritance taxes are excise taxes "im-

posed on the privilege of transmitting or receiving property upon the death of the owner." 28 Am. Jur. 12. See also 61 C. J. 1592. Our legislature did not express an intention to levy an estate tax on the privilege of transmitting property under the laws of the United States, and it seems elementary that it could not constitutionally do so. 61 C. J. 1604, note 41; 28 Am. Jur. 16, 90; In re Estates of Harnkess' 83 Okla. 107, 204 P. 911, 42 A. L. R. 399; Frick v. Pennsylvania, 268 U. S. 473, 69 L. Ed. 1058, 45 S. Ct. 603, 42 A.L.R. 316.

For the foregoing reasons, I respectfully dissent.

Gibson, J., concurs in this dissent.

[fol. 81] [File endorsement omitted]

IN THE SUPREME COURT OF OKLAHOMA

[Title omitted]

MOTION FOR ORDER STAYING MANDATES—Filed October 31, 1947

Come now the plaintiffs in error in the above-entitled consolidated causes, and respectfully show to the Court that they, and each of them, desire to appeal to the Supreme Court of the United States from the decision of this Court rendered herein on October 28, 1947, and that they desire that the mandate in each of said causes be stayed pending such appeals.

[fol. 82] Wherefore, plaintiffs in error pray the Court to enter an order herein staying the mandate in each of said above-styled causes pending the separate appeals herein of plaintiffs in error to the Supreme Court of the United States.

Frank Mahan, McCoy, Craig and Pearson, Attorneys for Plaintiffs in Error.

Affidavit of Mailing

STATE OF OKLAHOMA,
County of Osage, ss:

Jno. T. Craig, being duly sworn, upon his oath states that he is one of the attorneys for the above named plaintiffs in error; that on October 30, 1947, he enclosed a copy of

the above motion to stay mandates in an envelope addressed to Hon. C. W. King, one of the attorneys for the above-named defendant in error, at his office in care of the Legal Division, Oklahoma Tax Commission, Oklahoma City, Oklahoma, and deposited the same, with postage thereon paid, in the United States post office at Pawhuska, Oklahoma.

Jno. T. Craig.

Subscribed and sworn to before me this 30th day of October, 1947. My Commission expires Dec. 3, 1949.

Eileen Souter, Notary Public. (Seal.)

[fol. 83] [File endorsement omitted.]

IN THE SUPREME COURT OF OKLAHOMA

ORDER STAYING MANDATES—Filed November 13, 1947

The Clerk is hereby directed to enter the following order:

31,947—Floyd O. Yarbrough, et al., v. Oklahoma Tax Commission.

31,948—Mary Morton West v. Oklahoma Tax Commission.

Ordered that mandate be stayed in the above consolidated causes until February 12, 1948; pending appeal to the Supreme Court of the United States, and thereafter until disposition of the appeal by said court if said appeal is filed within the above prescribed period.

Thurman S. Hurst, Chief Justice. Andy Payne, Clerk.

[fol. 84] [File endorsement omitted.]

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1947

MARY MORTON WEST, Osage Allottee No. 192, Appellant,

vs.

OKLAHOMA TAX COMMISSION, Appellee

PETITION FOR ALLOWANCE OF APPEAL AND PRAYER FOR REVERSAL—Filed November 24, 1947

To the Honorable Chief Justice of the Supreme Court of the State of Oklahoma:

Your appellant in the above-entitled cause, and appellant and plaintiff in error in the cause in the Supreme Court of Oklahoma, hereinafter referred to, considering herself aggrieved by the final decision and judgment of the Supreme Court of Oklahoma, entered on the 28th day of October, 1947, (which judgment became final on that day following a previous decision in said cause handed down on June 25, 1946, to which prior decision appellant had in due time filed her petition for a rehearing) in the cause entitled:

> "Mary Morton West, Osage Allottee No. 192, Plaintiff in Error, vs. Oklahoma Tax Commission, Defendant in Error, No. 31948"

on the docket of said court, affirming the order and judgment of the Oklahoma Tax Commission, hereby files her [fol. 85] petition for an appeal from said decision and judgment to the Supreme Court of the United States.

In the above-entitled cause in the Supreme Court of Oklahoma there is drawn in question the validity of a statute of the State of Oklahoma, to-wit, Sections 988 to 989t, inclusive, Title 68, Oklahoma Statutes 1941, on the ground of its being repugnant, as applied in this case, to the Fourteenth Amendment to the Constitution of the United States in that it deprives this appellant of her property without due process of law and denies to her the equal protection of the laws; further, being repugnant to treaties and laws of the United States relating to the Osage Tribe of Indians, and to Article I, Section 8, of the Constitution

of the United States, in that said statute, as applied to
estate of Charles West, Jr., deceased, impinges upon
right, power and authority of the United States to legis
for and on behalf of its Osage Indian wards, and upon
duty of the United States to execute and carry out the te
of an express trust assumed by the Federal Government
and on behalf of the Osage Tribe of Indians.

The decision and final judgment of the Supreme Cour
Oklahoma herein appealed from were in favor of the va
ity of said statute of the State of Oklahoma.

The Supreme Court of Oklahoma is the highest court
the State of Oklahoma in which a decision in this suit co
be had.

Appellant shows that this case is one in which, under
legislation in force, to wit: Section 237 (a) of the Judi
Code, as amended by the Act of February 13, 1925, and
Act of January 31, 1928 (28 U.S.C., secs. 344(a), 861a
review may be had in this court as a matter of right
appeal.

[fol. 86] This appeal is accompanied by an assignment
errors setting forth the grounds upon which it is conten
that the decision and judgment of the Supreme Court
Oklahoma should be reversed, and a statement particula
disclosing the basis upon which it is contended that
Supreme Court of the United States has jurisdiction
review said decision and judgment of the Supreme Cour
Oklahoma.

Wherefore, your appellant prays:

That an appeal may be allowed herein from the Supre
Court of Oklahoma to the Supreme Court of the Uni
States in order that said decision and judgment of the
preme Court of Oklahoma may be examined and revers
that a transcript of the material part of the record in
cause, duly authenticated, may be ordered to be prepa
and certified to the Supreme Court of the United States
provided by law; that an order may be made fixing
security to be required of appellant; that the cost b
tendered herewith by appellant may be approved; and t
there be issued to appellee a citation directing said appe
to appear in the Supreme Court of the United States
Washington, D. C., within forty days from the date her
and there to show cause, if any there be, why said decis

and judgment should not be reversed and speedy justice be done to the appellant in that behalf.

Frank T. McCoy, John T. Craig, John R. Pearson, Frank Mahan, Counsel for Appellant, Pawhuska, Oklahoma.

[fol. 87] Service of the foregoing petition for appeal and receipt of copy thereof at Oklahoma City, Oklahoma, this 24 day of November, 1947, is hereby acknowledged.

C. W. King, Counsel for Appellee, Oklahoma City, Oklahoma.

[fol. 87a] [File endorsement omitted]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS—Filed November 24, 1947

Appellant, Mary Morton West, Osage Allottee No. 192, for her assignment of errors herein, says that the Supreme Court of Oklahoma, in its decision and judgment in the cause entitled

> "Mary Morton West, Osage Allottee No. 192, Plaintiff in Error, vs. Oklahoma Tax Commission, Defendant in Error, No. 31948,"

erred in approving and affirming the order and judgment of the Oklahoma Tax Commission in a proceeding before said Oklahoma Tax Commission, being case No. 1743, in the matter of the inheritance tax on the estate of Charles West, Jr., Deceased, and wherein said Oklahoma Tax Commission entered an order and judgment assessing estate taxes against said estate. Upon review of such order and judgment of the Oklahoma Tax Commission the Supreme Court of Oklahoma erred in each of the following particulars, and in each such particular appellant was deprived of her property without due process of law, and was also denied equal protection of law, contrary to and in violation of the Constitution of the United States.

[fol. 87b] I. The Supreme Court of Oklahoma erred in affirming the order and judgment of the Oklahoma Tax

Commission, for the reason that in applying the Oklahoma estate or inheritance tax law to the estate of a restricted member of the Osage Tribe of Indians and to property of such estate the title to which is in the United States in trust for such restricted Osage Indian the judgment of said court is in direct conflict with former decisions of the Supreme Court of the United States and of Federal District Courts and Circuit Courts of Appeals in similar cases.

II. Said Court erred in affirming the order and judgment of the Oklahoma Tax Commission, for the reason that the United States government holds the property involved under a trust established by treaty and by Acts of Congress imposing upon the government the duty to deliver the corpus of the trust property to the individual members of the Osage Tribe at the end of the trust period. Application of the Oklahoma estate or inheritance tax law to such property and the exaction of the tax thereby provided for would interfere with such governmental duty and diminish the trust estate.

III. Said Court erred in affirming the order and judgment of the Oklahoma Tax Commission, for the reason that the corpus of such trust property does not become the property of the individual member of the Osage Tribe until the termination of the trust period, and the imposition of the Oklahoma inheritance or estate tax which includes in its measure property which was not the property of the decedent at the time of his death constitutes a denial of due process of law and of the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United [fol. 87c] States.

IV. Said Court erred in affirming the order and judgment of the Oklahoma Tax Commission, for the reason that the immunity from state taxation of property held in trust by the United States for Osage Indians has never been withdrawn by Congress by any Act granting express permission to the State of Oklahoma to levy the tax in controversy.

For each of the errors specified above and because in each of said respects said decision and judgment of the Supreme Court of Oklahoma, in approving and affirming the order and judgment of the Oklahoma Tax Commission, deprives appellant of her property without due process of law, and denies to appellant the equal protection of the laws, appellant prays that said decision and judgment be reviewed by

the Supreme Court of the United States and there reversed and judgment rendered in favor of the appellant and for her costs.

Frank T. McCoy, John T. Craig, John R. Pearson, Frank Mahan, Counsel for Appellant.

[fol. 87d] Service of the foregoing assignment of errors and receipt of a copy thereof at Oklahoma City, Oklahoma, is hereby acknowledged this 24 day of November, 1947.

C. W. King, Counsel for Oklahoma Tax Commission.

[fol. 88] [File endorsement omitted]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed November 24, 1947

The petition of Mary Morton West, Osage Allottee No. 192, for an appeal in the above cause (being Case No. 31948, Styled Mary Morton West, Osage Allottee No. 192, plaintiff in Error, vs. Oklahoma Tax Commission, Defendant in Error, upon the docket of the Supreme Court of the State of Oklahoma) to the Supreme Court of the United States from the Supreme Court of the State of Oklahoma, and the assignment of errors and the jurisdictional statement required by the rules of the Supreme Court of the United States being filed therewith, having been presented, and having been considered, together with the record of said cause, it is

Ordered, that an appeal be, and the same hereby is allowed to the Supreme Court of the United States from the Supreme Court of the State of Oklahoma, as prayed in said petition, and that the Clerk of the Supreme Court of the State of Oklahoma prepare and certify a transcript of the record and proceedings in the above cause and transmit same to the Supreme Court of the United States so that same shall be delivered to said court last named within forty days from the date hereof.

[fol. 89] And the said appellant, having presented to the Chief Justice of the Supreme Court of Oklahoma a good and sufficient cost bond in the sum of Five Hundred Dollars

($500.00) as security, with Maryland Casualty Company, a corporation, as surety, conditioned that appellant prosecute such appeal to effect, and if said appellant fails to make her plea good, she shall answer and pay all costs; and said bond having been taken and examined by me, is approved.

The appeal shall operate as a supersedeas, and the mandate of this court is hereby stayed and the effectiveness of the judgment and order appealed from is hereby stayed pending the final determination of said appeal.

Dated this 24 day of November, 1947.

Thurman S. Hurst, Chief Justice of the Supreme Court of Oklahoma.

Attest: Andy Payne, Clerk, by Ethel C. Hammett, Deputy. (Seal.)

Service of the above and foregoing order allowing appeal and the receipt of a copy thereof is acknowledged by each of the undersigned this 24 day of November, 1947.

C. W. King, Counsel for the Oklahoma Tax Commission.

[fols. 90-91] Citation in usual form showing service on C. W. King, filed November 24, 1947, omitted in printing.

[fols. 92-93] Bond on appeal for $500.00 approved and filed November 24, 1947, omitted in printing.

[fols. 94-122] [File endorsement omitted]

IN THE SUPREME COURT OF OKLAHOMA

[Title omitted]

No. 31948

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed November 24, 1947

To the Clerk of the Above Named Court:

You are hereby requested and directed to make a transcript of the record in the above styled and numbered cause to be filed in the Supreme Court of the United States pursuant to an appeal allowed in said cause, and to include

in such transcript of the record the following, and no other, papers and *exhibits*, to-wit:

[fol. 123] 1. A full and complete transcript of the record certified to the Supreme Court of Oklahoma by the Oklahoma Tax Commission, under date of August 24, 1944, and filed in the Supreme Court of Oklahoma, with petition in error attached, on September 9, 1944, including the following:

(a) Petition in error (found in front of case-made):

(b) Estate Tax Return (page 2 of case-made):

(c) Notices from Oklahoma Tax Commission (pages 4, 5, and 6 of case-made):

(d) Order Assessing Tax (page 7 of case-made):

(e) Protest (pages 9-14 of case-made):

(f) Stipulation (pages 16-21 of case-made):

(g) Order (pages 23-25 of case-made):

(h) Notice of appeal (pages 27-31 of case-made):

(i) Letter to Oklahoma Tax Commission (page 33 of case-made):

(j) Certificate of Oklahoma Tax Commission (page 34 of case-made):

(k) Secretary's Certificate (page 35 of case-made):

2. Stipulation for consolidation (filed September 26, 1944):

3. Order for consolidation (filed October 10, 1944):

[fol. 124] 4. Opinion and decision of the Supreme Court of Oklahoma (dated June 18, 1946):

5. Petition for rehearing (filed July 1, 1946):

6. Opinion and decision of the Supreme Court of Oklahoma (dated October 28, 1947):

7. Dissenting opinion (filed October 28, 1947):

8. Motion for stay of mandate (filed October 31, 1947):

9. Order staying mandate (filed November 13, 1947):

10. Petition for appeal and prayer for reversal (filed November 24, 1947), with acknowledgment of service;

11. Assignment of Errors (filed November 24, 1947), with acknowledgment of service;

12. Jurisdictional statement (filed November 24, 1947), with acknowledgment of service:

13. Order allowing appeal and fixing cost bond (filed November 24, 1947), with acknowledgment of service:

14. Citation to appellee (filed November 24, 1947), with acknowledgment of service:

15. Cost bond with approval thereof and acknowle-gment of service (filed November 24, 1947):

16. Statement directing attention of appellee to paragraph 3 of Rule 12 of the Supreme Court of the United States, with acknowledgment of service (filed November 24, 1947):

17. Praecipe for transcript of record, with acknowledgment of service (filed November 24, 1947):

18. Statement of points to be relied upon, with acknowledgment of service (filed November 24, 1947):

19. A full, complete and accurate index of the record required by this praecipe.

Said transcript to be prepared as required by law and the rules of this court and the rules of the Supreme Court of the United States, and to be filed in the office of the Clerk of the Supreme Court of the United States on or before the 3rd of January, 1948.

[fol. 125] Frank T. McCoy, John T. Craig, John R. Pearson, Frank Mahan, Counsel for Appellant.

Service of the foregoing praecipe for transcript of record and receipt of copy thereof at Oklahoma City, Oklahoma, this 24 day of November, 1947, is hereby acknowledged.

C. W. King, Counsel for Oklahoma Tax Commission.

[fol. 126] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 127] Supreme Court of the United States

Statement of Points Intended to Be Relied Upon—Filed December 23, 1947

Comes now the appellant in the above-entitled cause, and hereby specifies the following points as those intended to be relied upon and urged by her in this appeal, to-wit:

1. The various classes of property involved were and are immune from taxation by the State of Oklahoma for

the reason that the title thereto is in the United States, and the Supreme Court of Oklahoma erred in holding to the contrary.

2. Under treaty between the United States and the Osage Tribe of Indians and by Acts of Congress the United States holds the property involved in trust for the Osage Tribe and its members, and imposition of the tax in controversy would interfere with the duty of the federal government with respect to such trust and diminish the trust estate.

3. The corpus of the trust property involved does not become the property of the individual restricted Osage Indian until the expiration of the trust period, already extended by Act of Congress until 1983 and 1984, and the inclusion of such property in the estate of the décedent for Oklahoma estate tax purposes constitutes a denial of due process of law and of the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

[fol. 128] 4. The immunity of the classes of property involved from state taxation has never been withdrawn by Congress. On the contrary, Congress has from time to time re-enacted legislation extending the trust period after judicial determination by the Supreme Court of the United States and other federal courts that property the title to which is in the United States in trust for Indians is exempt from state taxation without Congressional consent.

Frank T. McCoy, John T. Craig, John R. Pearson, Frank Mahan, Counsel for Appellant.

Service of the foregoing designation of points intended to be relied upon and receipt of a copy thereof at Oklahoma City, Oklahoma, is hereby acknowledged this 24 day of November, 1947.

C. W. King, Counsel for Oklahoma Tax Commission.

[fol. 129] SUPREME COURT OF THE UNITED STATES

DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed December 23, 1947

Comes now the appellant in the above entitled cause and hereby makes her designation of parts of the record to be printed, as follows:

1. Estate Tax Return;
2. Order Assessing Tax;
3. Notices from Oklahoma Tax Commission;
4. Protest;
5. Stipulation;
6. Order No. 17,874 assessing tax;
7. Notice of Appeal;
8. Certificate of Oklahoma Tax Commission to payment of tax;
9. Letter transmitting amount of tax to Oklahoma Tax Commission;
10. Secretary's Certificate of true transcript;
11. Petition in error filed in Supreme Court of Oklahoma;
12. Stipulation for consolidation of cases;
13. Order of consolidation;
14. Opinion and decision of the Supreme Court of Oklahoma dated June 18, 1946;
15. Petition for rehearing filed July 1, 1946;
16. Opinion and decision of the Supreme Court of Oklahoma dated October 28, 1947;
17. Dissenting opinion filed October 28, 1947;
18. Motion for stay of mandate filed October 31, 1947;
19. Order staying mandate filed November 13, 1947;
20. Petition for appeal and prayer for reversal, with acknowledgment of service;
21. Assignment of errors, with acknowledgment of service;

[fol. 130] 22. Jurisdictional statement, with acknowledgment of service;

23. Order allowing appeal and fixing cost bond, with acknowledgment of service;
24. Citation to appellee, with acknowledgment of service;
25. Cost bond with approval thereof and acknowledgment of service;

26. Statement directing attention of appellee to paragraph 3 of Rule 12 of the Supreme Court of the United States, with acknowledgment of service;
27. Praecipe for transcript of record, with acknowledgment of service;
28. Statement of points to be relied upon, with acknowledgment of service;
29. Designation of parts of record to be printed, with acknowledgment of service.

Frank T. McCoy, John T. Craig, John R. Pearson, Frank Mahan, Counsel for Appellant.

Service of the foregoing designation of parts of record to be printed and receipt of copy thereof at Oklahoma City, Oklahoma, this 24 day of November, 1947, is hereby acknowledged.

C. W. King, Counsel for Oklahoma Tax Commission.

[fol. 130a] [File endorsement omitted]

[fol. 131] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—January 19, 1948

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on Cover: Enter Frank T. McCoy. File No. 52,719, Oklahoma, Supreme Court, Term No. 489, Mary Morton West, Osage Allottee No. 192, Appellant, vs. Oklahoma Tax Commission. Filed December 23, 1947. Term No. 489 O. T. 1947.

FILE COPY

DEC 23 1947

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 489

MARY MORTON WEST, Osage Allottee No. 192,
Appellant,

vs.

OKLAHOMA TAX COMMISSION

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

STATEMENT AS TO JURISDICTION

Frank T. McCoy,
John T. Craig,
John B. Pearson,
Frank Mahan,
Counsel for Appellant.

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SUPREME COURT OF THE STATE OF OKLAHOMA

No. 31948

MARY MORTON WEST, OSAGE ALLOTTEE No. 192,
Plaintiff in Error,

vs.

OKLAHOMA TAX COMMISSION,
Defendant in Error

STATEMENT AS TO JURISDICTION

Statement of the Case and Holding of Court

This case originated before the Oklahoma Tax Commission, and involves the question of the includability for Oklahoma estate tax purposes of certain classes of property belonging to the estate of a deceased full blood restricted Osage Indian, Charles West, Jr., who died interstate September 2, 1940, while domiciled in and a resident of the State of Oklahoma. The classes of property involved are as follows:

1. 1 919/2520 Osage Indian mineral headrights, being deceased's right to share in the income from the Osage Tribal mineral estate, title to which is in the United States in trust for the Osage Tribe.
2. Stocks, bonds, and interest in mortgage purchased by and in the name of the United States from funds accumulated from Osage headrights.
3. Accruals from Osage headrights, held in trust by the United States.
4. Trust funds in the Treasury of the United States, being decedent's share in the proceeds of the sale of Osage tribal lands in Kansas.

The administrator of decedent's estate duly filed an estate tax return with the Oklahoma Tax Commission, and to the order of the Commission, entered September 20, 1943, assessing tax and penalty in the amount of $5,313.35, appellant filed her written protest. Summarized briefly, this protest presented the contention that the Oklahoma estate or inheritance tax statute, as applied by the Commission, was invalid because in conflict with and repugnant to the Constitution, treaties and laws of the United States as the same relate to the Osage Tribe of Indians and the members and estates of members of said tribe.

Thereafter the matter heard before the Oklahoma Tax Commission upon the protest filed and upon a stipulation of facts entered into by the parties showing the value of the estate and the character and value of the various items making up the same. After such hearing and on August 14, 1944, the Commission entered an order finding and adjudging that the estate should be assessed estate taxes in the amount of $4,263.15, but conditionally waiving penalty and interest. The amount of tax so assessed was arrived at by the inclusion in the gross estate of all classes of property of which the estate was composed, except the homestead. Exception to the order was taken and an appeal duly prosecuted by appellant to the Supreme Court of the State of Oklahoma by petition in error with case-made attached.

The petition in error specifically raised by way of various assigned errors, the defense that the Oklahoma inheritance or estate tax statute, as applied by the Oklahoma Tax Commission in this case, was and is invalid because in conflict with and repugnant to the Constitution, treaties and laws of the United States.

The case was briefed, argued and submitted to the Supreme Court of Oklahoma, with a companion case consolidated therewith, and on the 28th day of October, 1947, that Court handed down an opinion upholding the validity

of the statute as applied by the Commission, contrary to appellant's contentions regarding the Federal questions presented.

The Supreme Court of Oklahoma held that the title to the property involved is not in the United States, stating in the opinion that "We reject at once as untenable the assertion that the title to this property remained in the federal government under the various laws applicable to the Osages."

That Court further held that the properties in question "pass by law at death," contrary to the specific provisions of Osage Acts that such properties become the property of the individual members only at the expiration of the trust period.

Opinions Below

The Oklahoma Tax Commission did not hand down an opinion, but merely entered an order assessing the tax, a copy of which order is attached hereto as Exhibit One. All of the proceedings before the Oklahoma Tax Commission are embodied in the case-made filed in the Supreme Court of Oklahoma and are contained in the transcript to this Court. The Supreme Court of Oklahoma first handed down an opinion in said cause on June 25, 1946, affirming the order and judgment of the Oklahoma Tax Commission, a copy of which opinion is hereto attached as Exhibit Two. Thereafter, and on October 28, 1947, after petition for rehearing was duly filed by appellant, said Supreme Court of Oklahoma withdrew and superseded said opinion of June 25, 1946, by a changed opinion which affirmed the order and judgment of said Oklahoma Tax Commission and made its effectiveness prospective only; that said opinion has not yet appeared in the official Oklahoma Reports, but a copy thereof is attached hereto as Exhibit Three.

Date of Judgment and of Application for Appeal

The opinion and judgment of the Supreme Court of Oklahoma, a copy of which is appended hereto as Exhibit Three, was handed down and rendered on the 28th day of October, 1947. The application for appeal was presented on the 24th day of November, 1947.

Cases Believed to Sustain Jurisdiction

The cases believed to sustain the jurisdiction of this Court are as follows:

United States v. *Allegheny County, Pa.*, 322 U. S. 174, 191, 88 L. Ed. 1209;

Standard Oil Company of California v. *Johnson*, 316 U. S. 481, 483, 86 L. Ed. 1611;

Senior v. *Braden*, 295 U. S. 422, 429, 79 L. Ed. 1520;

Hoeper v. *Tax Commission*, 284 U. S. 206, 213, 76 L. Ed. 248;

Choate v. *Trapp*, 224 U. S. 665, 56 L. Ed. 941.

Statutory Provision Sustaining Jurisdiction

The statutory provision believed to sustain the jurisdiction of this Court is section 237 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and the Act of January 31, 1928 (28 U. S. C., secs. 344 (a) 861a).

State Statute Involved

The statute of the State of Oklahoma, the validity of which as applied is here involved, consists of Sections 988 to 989t, inclusive, Title 68, Oklahoma Statutes 1941, the provisions thereof pertinent to this appeal being as follows:

Section 989:

"A Tax, at the rates prescribed in Section 2 of this Act, is hereby levied upon the transfer of the net estate

of every decedent, whether in trust or otherwise, to persons, associations, corporations, or bodies politic, of property, real, personal, or mixed, whether tangible or intangible, or any interest therein or income therefrom, by will or the intestate laws of this State by any order setting apart property and/or granting family allowance pursuant to the probate code, by deed, grant, bargain, sale, or gift made in contemplation of the death of the grantor, vendor, or donor, or intended to take effect in possession or enjoyment at or after such death, whether made before or after the passage of this Act. * * *"

Section 989e:

"(A) The value of the gross estate used as a basis for the determination of the value of the net estate, shall be determined by including:

"(1) The value at the time of the death of the decedent of all property, real, personal, or mixed, whether tangible or intangible, of which the decedent died seized or possessed, within the jurisdiction of this State, and any interest therein or income therefrom, including the homestead in excess of Five Thousand ($5,000.00) Dollars, which shall pass to any person or persons, associations or corporations, in trust or otherwise, by testamentary disposition or by the laws of inheritance or succession of this or any other state or country."

Section 989i:

"Taxes levied under this Act shall be and remain a lien upon all the property transferred until paid, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of administration, allowed by the court having jurisdiction thereof, shall be divested of such lien. * * *"

Raising the Federal Question

The Federal question was first raised by written protest filed in the tribunal where the case originated. The portions of the protest specifically raising Federal questions are as follows:

1. "1. That the statute of the State of Oklahoma, to-wit: Sections 988 to 989t, Title 68, Oklahoma Statutes 1941, under which said assessment was made and entered and as applied by your Honorable Commission to the estate and the property thereof of said decedent, is invalid for the reason that the same is in conflict with and repugnant to the Constitution, treaties and laws of the United States as the same relate to and affect the property of said decedent, this protestant and the Osage Tribe of Indians and the members and estates of members of said tribe.

2. "2. That said assessment is invalid for the reason that this protestant claims immunity of the estate of the said Charles West, Jr., and of each and every item of property composing said estate, as hereinafter set out, from taxation under said statute, by virtue of the provisions of the Constitution, treaties and laws of the United States as the same relate to and affect the property of said decedent, this protestant and the Osage Tribe of Indians and the members and the estates of members of said tribe.

* * * * * * *

3. "4. The assessment of the property of the estate of said decedent is in conflict with the decision of the Supreme Court of the State of Oklahoma, in the case of Childers *v.* Pope, 119 Okl. 300, 249, P. 726.

4. "5. Protest is specifically made against the assessment upon the following items:

"A. Upon the value of $24,294.55, representing the items set forth in Schedules A-1 and A-2 of the return filed herein by the administrator. This sum includes the value of 1 and 919/2520ths Osage headrights owned

by the decedent at the time of his death, which headrights represent an undivided interest in the oil, gas, coal and other minerals under all the lands in Osage County, Oklahoma, which interest was reserved to the Osage Tribe of Indians by Act of Congress approved June 28, 1906 (34 Stat. L. 539), and all of which is a trust duly established by the United States for the benefit of the said Osage Tribe of Indians and heirs of the members of said tribe, which has never been subjected to state taxation. The headrights in this case are valued at $10,235.12. Your protestant shows that the remaining value in this particular schedule of $14,059.43 is not includable in the net estate; it was land purchased for the decedent by the use of restricted trust funds which had accumulated to the credit of the decedent from his headright; the remainder of said real estate was inherited by said decedent from various full blood restricted ancestors, including Osage restricted homestead, which was not and is not subject to state taxation.

"B. Upon the inclusion in the net estate of the sum of $73,505.80 set forth in Schedule B under the item of stocks and bonds; said stocks and bonds were purchased by and in the name of the United States and are still so held for said decedent in the exercise of the authority vested in the Secretary of the Interior by Acts of Congress, the purchases having been made from funds accumulated from the aforementioned Osage headrights; said funds and said stocks and bonds at all times since the acquisition thereof having been held by the Secretary of the Interior and never subjected to state taxation.

"C. Upon the inclusion in the net estate of property set forth in Schedule C in the amount of $34,926.69, (a) cash, $29,445.17, which represents the accruals from the Osage headright payments as aforementioned, (b) $736.00 represents certain items of personal property which were purchased with funds accruing to the Osage headrights, and (c) the remainder of $4,745.52 represents the trust funds in the hands of the Treas-

urer of the United States, being decedent's share in the proceeds of the sale of the Osage Tribe's lands in Kansas, and which were credited to each Osage Indian, which have never been subjected to state taxation.

"That under the express provisions of the Act of Congress approved March 2, 1929, (45 Stat. 1478) each and all of the aforesaid items of property belonging to said estate have heretofore been held and still continue to be held in trust by and subject to the supervision of the United States.

5. "6. No authority has ever been granted by the Congress of the United States to the State of Oklahoma to levy a tax upon the transfer of property owned by deceased Osage Indians."

On appeal from the order of the Oklahoma Tax Commission assessing the tax the Federal questions were again raised in the form of the following errors assigned in the petition in error filed in the Supreme Court of the State of Oklahoma:

1. That no tax is due under the decision of the Supreme Court of Oklahoma in the case of Childers *v.* Pope, 119 Okl. 300, 249 Pac. 726, or at least not the amount assessed.

2. That the statute of the State of Oklahoma to-wit: Sections 988 to 989t, inclusive, Title 68 Oklahoma Statutes 1941, under which said order of assessment was made, and said statute as applied and enforced to protestant's disadvantage by said Oklahoma Tax Commission in the making of said assessment and order, violates the 14th Amendment to the Constitution of the United States by imposing an estate tax on this estate or a part thereof which is constitutionally immune therefrom, and abridges and denies this protestant's privileges and immunities guaranteed to her by the Constitution of the United States, the Osage treaties and laws, and deprives her of her property without due process of law and denies to her the equal protection of the law.

3. That said state statute, and said statute as applied and enforced to protestant's disadvantage by said Oklahoma Tax Commission in this case, in violation of the 14th Amendment to the Constitution of the United States, Osage treaties and laws, imposes an inheritance and transfer tax which includes in its measure property which protestant does not receive, to-wit: (a) the value of the corpus of the undivided portion of the minerals in and under Osage County held by the United States in trust for the Osage Tribe of Indians, from which decedent during his life was permitted to receive a part of the income: (b) the value of a portion of the Osage Trust Fund determined and held by the United States, from which the decedent during his life was permitted to receive a part of the interest thereon; (c) a fractional part of the money from Osage tribal minerals received and held in trust by the United States for the Osage Tribe after payment therefrom to the decedent during his lifetime of certain annuities as provided by law.

4. That said state statute, and said statute as applied and enforced to protestant's disadvantage by said Oklahoma Tax Commission in this case, in violation of the Constitution of the United States, Osage treaties and laws, imposes on protestant an inheritance and transfer tax which includes in its measure property of the United States and property held by the United States in trust for the Osage Tribe of Indians in which decedent and this protestant had and have no individual vested property interest.

5. That said state statute, and said statute as applied and enforced to protestant's disadavantage by said Oklahoma Tax Commission in this case, contrary to the 14th Amendment to the Constitution of the United States, Osage treaties and laws, imposes on protestant an inheritance and transfer tax which includes in its measure property held in trust by the United States long prior to the admission of the State of Oklahoma into the Union and the enactment of its first inheritance and estate tax law, and under which

trust no transfer thereof took place upon the death of decedent.

6. That said state statute, and said statute as applied and enforced to protestant's disadvantage by said Oklahoma Tax Commission in this case, would interfere with and defeat the United States in performing its governmental duty to the Osage Tribe of Indians, including this protestant, and diminish the trust estate, contrary to Osage treaties and laws, which trust estate is to be delivered by the trustees to the remainder-men in 1983.

7. That the title to part of said property included in the measure of said tax is in the United States and is constitutionally immune from state taxation.

8. That if any property right passed at the death of the decedent to this protestant, it did so by virtue of the federal law and not by state law.

9. That said state statute, and said statute as applied and enforced to protestant's disadvantage by said Oklahoma Tax Commission in this case, violates the rights of protestant and of the United States under Section 8 of Article 1 of the Constitution of the United States relating to commerce with the Indian Tribes.

10. That said state statute, and said statute as applied and enforced to protestant's disadvantage by said Oklahoma Tax Commission in this case, violates Section 1 of the Enabling Act (34 Stat. L. 267-278) of the State of Oklahoma.

11. That by reason of Constitutional immunity, said minerals, trust fund and proceeds from said minerals held by the United States in trust for the Osage Tribe have never been subjected to state taxation.

12. That Congress has never granted authority to the State of Oklahoma to levy a tax upon the transfer of property held in trust by the United States for the Osage Tribe of Indians.

Statement of the Grounds upon Which It Is Contended That the Questions Involved Are Substantial

1. The decision and judgment of the Supreme Court of Oklahoma and the application of the inheritance or estate tax statute in question, being Sections 988 to 989t, inclusive, Title 68, Oklahoma statutes 1941, to property the title to which is in the United States in trust for Indians are in direct conflict with former decisions of this Court and of Federal District Courts and Circuit Courts of Appeals in similar cases. *United States* v. *Rickert,* 188 U. S. 432, 47 L. Ed. 532; *McCurdy* v. *United States,* 264 U. S. 484, 68 L. Ed. 801; *Oklahoma* v. *Barnsdall Refineries, Inc.,* 296 U. S. 521, 80 L. Ed. 366; *United States* v. *Thurston County,* 143 F. 287; *United States* v. *Board of Com'rs,* 145 F. (2d) 329.

The case of *Oklahoma Tax Commission* v. *United States,* 319 U. S. 598, 87 L. Ed. 1612, does not either expressly or impliedly overrule the above cases and does not govern this case, since in that case title to the property involved was in the individual Indian, rather than in the United States, and all minerals produced from the Indian's land had been by Act of Congress made subject to all State and Federal taxes.

2. The United States government holds the property involved under a trust established by Acts of Congress imposing upon the government the duty to deliver the *corpus* of the trust property to the individual members of the Osage Tribe at the end of the trust period, already extended by successive Acts of Congress to 1983 and 1984. Act of Congress approved June 28, 1906 (34 Stat. 539); Act of Congress approved March 3, 1921 (41 Stat. L. 1249); Act of Congress approved March 2, 1929 (45 Stat. 1478); Act of Congress approved June 24, 1938 (54 Stat. 1034). The exaction of the tax in question would interfere with such governmental duty and diminish the trust estate.

3. Under the provisions of the Acts of Congress above cited the *corpus* of the trust property does not become the property of the individual member of the Osage Tribe until the termination of the trust period, already extended by Congress on the tribal mineral interest to April 8, 1983, and on the moneys and other properties held in trust until January 1, 1984. To impose upon the estate of the decedent an inheritance or estate tax which includes in its measure property which was not the property of the decedent at the time of his death would constitute a denial of due process of law and of the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States. *Brooke* v. *City of Norfolk,* 277, U. S. 27, 72 L. Ed. 767; *May* v. *Heiner,* 281 U. S. 238, 74 L. Ed. 826; *Hoeper* v. *Tax Commission,* 284 U. S. 206, 215, 76 L. Ed. 248.

4. The immunity from state taxation of property held in trust by the United States for Osage Indians which inheres in the principle that "the instrumentalities, means and operations whereby the United States exercises its governmental powers are exempt from taxation by the states" has never been withdrawn by Congress. *Oklahoma* v. *Barnsdall Refineries, Inc.,* 296 U. S. 521, 80 L. Ed. 366; *Indian Motorcycle Co.* v. *United States,* 283 U. S. 570, 575, 75 L. Ed. 1277.

Conclusion

It is respectfully submitted that for the reasons given this Court has jurisdiction of the appeal.

Dated November 24, 1947.

Respectfully submitted,

FRANK T. MCCOY,
JOHN T. CRAIG,
JOHN R. PEARSON,
FRANK MAHAN,
Counsel for Plaintiff in Error.

EXHIBIT "1"

BEFORE THE OKLAHOMA TAX COMMISSION

No. 1743

In the Matter of the Assessment of Estate Taxes Against Charles West, Jr., Deceased

Order No. 17,874

This cause coming on for hearing before the Oklahoma Tax Commission on the 14th day of July, 1944, the Commission being present by the Chairman J. Frank Martin and J. D. Dunn, Vice-Chairman; protestant appearing by its attorneys, Frank T. McCoy of Pawhuska, Oklahoma, and Frank Mahan of Fairfax, Oklahoma; and the Oklahoma Tax Commission appearing by Walter Harris, Director of the Inheritance and Estate Tax Division, and the Commission being represented by E. L. Mitchell, A. L. Herr and C. W. King of the Legal Division, said Commission, after hearing the protest of the taxpayer and after having examined the returns of the taxpayer, the appraisement of the estate and property and assets of the said estate of Charles West, Jr., deceased, and after considering all of the evidence in the case takes said case under advisement; thereafter and on the 14 day of August, 1944, said Commission finds that each and all of the items mentioned in the stipulation of facts, have and except the inherited tax exempt Osage homestead, should be included in this gross estate and taxed under the Oklahoma inheritance, transfer and estate tax statutes, Title 68, Section 989, (a) to (t) inclusive, O. S. 1941.

That there is due as transfer, inheritance and estate taxes from the estate of the said Charles West, Jr., deceased the amount of $4,263.15 and interest at the rate of 1 per cent per month thereon from the 2nd day of December, 1941.

It is the judgment and opinion of the Commission that if the amount of tax finally decreed to be due the State of Oklahoma from this estate shall be paid within 30 days from the recording of the mandate of the court in case of appeal, from this order, that no interest or penalty should be charged.

It is, therefore, ordered, adjudged and decreed, by the Oklahoma Tax Commission that transfer, inheritance and estate taxes in the amount of $4,263.15 is hereby assessed against the said estate of Charles West, Jr., deceased, and ordered to be paid to the Oklahoma Tax Commission by the said estate; that if said tax is paid within 30 days from the final judgment of the Commission or the recording of the mandate of the court in case of appeal, then no interest or penalty shall be assessed or collected; that if said tax is not paid within said time, there shall be paid the additional amount due as interest at the date of 1 per cent per month from the 2nd day of December, 1941, to date of final payment.

Exception to this order having been taken by the taxpayer and notice of appeal to the Supreme Court of Oklahoma from this judgment and order of assessment having been given, this judgment and order shall be held in abeyance and shall be nonoperative for a period of 30 days from date, and if appeal shall have been perfected to the Supreme Court of the State of Oklahoma within said time, then said judgment shall be further held in abeyance until the final determination of the controversy by the court of last resort to which said cause shall be appealed.

Dated this 14 day of August, 1944.

OKLAHOMA TAX COMMISSION,
By J. FRANK MARTIN,
Chairman,
J. D. DUNN,
Vice-Chairman,
R. H. SIBLEY,
Member.

Attest:

H. D. CANFIELD,
(Seal) *Secretary.*

Approved:

FRANK T. McCOY,
Attorney for Taxpayer.
C. W. KING,
Attorney for the
Oklahoma Tax Commission.

EXHIBIT "2"

Filed in Supreme Court of Oklahoma, Jun. 18, 1946, Andy Payne, Clerk.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 31947

FLOYD O. YARBROUGH, Executor of Estate of Dora Neal Rector, Deceased, *Plaintiff in Error,*

vs.

OKLAHOMA TAX COMMISSION, *Defendant in Error,*

and

MARY WEST, *Plaintiff in Error,*

vs.

OKLAHOMA TAX COMMISSION, *Defendant in Error*

No. 31948

SYLLABUS

The estates of deceased, fullblood, restricted, Osage Indians, except the allotted homestead, are subject to the estate, or transfer, or inheritance tax levied by the State of Oklahoma under the provisions of 68 O. S. 1941, secs. 988 et seq.

Appeal from the Oklahoma Tax Commission
Affirmed

Frank T. McCoy, John T. Craig, John R. Pearson, Pawhuska, Oklahoma; Frank Mahan, Fairfax, Oklahoma, for Plaintiffs in Error.

E. L. Mitchell, C. W. King, Oklahoma City, Oklahoma, for Defendant in Error.

BAYLESS, *J.:*

This appeal from the Oklahoma Tax Commission involves only the issue of the power of the State of Oklahoma to levy and collect an estate, transfer, and inheritance tax under

68 O. S. 1941, secs. 988 et seq., in the estate of Dora Neal Rector, deceased, who was a fullblood, allotted restricted Osage Indian. This person died leaving an estate consisting of (1) allotted homestead land; (2) allotted surplus land and land inherited from other Osages; (3) 2 and 13/252nds Osage Mineral Headright interests; (4) cash in the hands of the United States Treasurer derived from the income from the headright interests; and (5) cash in the hands of the United States Treasurer representing her share of the sale price of tribal lands in Kansas. It is conceded the allotted homestead is non-taxable and the Commission made no order taxing it under the above statute. The executor of Rector's estate appeals. There is a similar appeal on the identical issue by the representative of the estate of Charles West, Jr., a deceased minor, unallotted Osage Indian, whose estate consisted of (1) 1 and 919/2520ths Osage Mineral Headright interests; (2) land purchased with funds derived from the headright interests and land inherited from other Osages; (3) cash in the hands of the United States Treasurer representing accruals of income from the headright interests; (4) personal property purchased with funds derived from the headright interests; and (5) cash in the hands of the United States Treasurer representing his share of the sale price of tribal lands in Kansas. These appeals are consolidated for presentation to us and decision. In addition to the briefs of the parties, briefs amicus curiae have been filed.

The methods of stating and treating the various law issues differ in these briefs, but essentially they all coincide on certain issues that determine the controversy. We shall treat these issues in an arrangement that tends to our convenience but does not overlook any aspect of the vital issues raised.

Before directing our attention to the specific issues argued, we will discuss an aspect of these cases that inheres in the position of appellants and is an assumption that underlies virtually all of their arguments. It is both asserted and implied that there is no reason, and there should be no disposition on the part of this court, to delve into this issue again. Briefly the main issue can be stated thus: No tax is due under an earlier decision of this court. See Childers

v. Pope, 119 Okl. 300, 249 P. 726. In that case it was held that the portion of the estate of a restricted Indian consisting of land and mineral interests was not taxable under Oklahoma law. However, this holding was not original with this court; there is no language in it that manifests a concurrence in the rationale of the rule adopted, and it is obvious the opinion was forcedly adopted by the controlling circumstance of an intervening opinion by the Supreme Court of the United States. See Childers *v.* Beaver, 270 U. S. 555, 70 L. Ed. 730 (7). It will be observed in reading the Childers *v.* Pope opinion that this court remarked it was "not disposed to go further than the rule therein announced.", (Beaver, supra), and expressly made subject to Oklahoma's taxing power, as an exception to the rule of the Beaver case, the personal property of the estate. The Beaver decision, as it related to land and mineral interests, was based on two grounds: (1) Such property descended by federal and not state law, and (2) The restrictions under which the federal government held some of the property of all Indians and all of the property of some Indians constitute a federal instrumentality that would be interfered with if subjected to state taxation. One of the best of reasons for again going into this issue, since our independent judgment was obstructed earlier, is the recent review and revision by the Supreme Court of the United States of the rules of law of the earlier federal decisions on this branch of the law. The traditional federal court view of the nontaxability of the property of Indians is illustrated by U. S. *v.* Rickert, 188 U. S. 432, 47 Law Ed. 532 and Childers *v.* Beaver, supra. The alteration in this view is disclosed by Shaw *v.* Gibson-Zahniser Oil Corp., 276 U. S. 575, 72 Law Ed. 709; Supt. etc. v. Comm. Int. Rev., 295 U. S. 418, 79 Law Ed. 1517; U. S. *v.* Oklahoma Tax Commission, 131 Fed. (2) 635: Helvering *v.* Mountain Producers Corp., 303 U. S. 376, 82 Law Ed. 907; Oklahoma Tax Commission *v.* U. S., 319 U. S. 598, 87 Law Ed. 1612, and the various decisions discussed therein. It is not an unfair summary of the two views to say that earlier the federal court decisions provided an almost complete immunity from taxation in any form where it appeared that any degree of wardship was exercised by the federal government toward the Indian (and

too frequently this immunity was spread over non-Indians in their contractural relations with Indian property), whereas, lately the Indians' immunity from taxation is not implied but must be rested upon some plain base, and it no longer spreads over their contractual privies. In reviewing the earlier decisions on the so-called "federal instrumentality" rule, the Supreme Court of the United States stated (Helvering *v.* Mountain Producers Corp., supra), "In the light of the expanding needs of State and Nation, the inquiry has been pressed whether this conclusion has adequate basis; * * * and the distinctions thus maintained have attenuated its teaching and raised grave doubt as to whether it should longer be supported,". In Oklahoma Tax Commission *v.* U. S., Supra, it was stated the instrumentality rule announced in the Beaver case, supra, "was in effect overruled." Thus if the Beaver opinion stood on no other basis than the instrumentality rule, it would no longer bar the State of Oklahoma in its effort to collect the tax involved. This alteration is sufficient justification for the State's renewed effort, an effort regarded as serious and persistent in the opinion in Oklahoma Tax Commission *v.* U. S., supra.

Previously we mentioned that the Beaver opinion stated, in addition to the instrumentality rule, another reason why the State of Oklahoma could not levy and collect the tax involved and this other reason is also urged against the State, with great stress, in the briefs. In short, as said in that opinion, "Apparently appellan*d* supposed that the land passed to the heirs by virtue of the laws of the State and were subject to the inheritance taxes which she laid. * * * The land really passed under a law of the United States, and not by Oklahoma's permission." Adopting this language and the language of the various Osage Acts and the decisions of the courts on a variety of issues arising thereunder, as well as other Indian laws, it is urged (1) that no title to this property ever vested in the Osages but the title remains yet in the Federal government and thus is no taxable, or (2) if title actually vested in the individual Osages, the devolution thereof is by virtue of Federal and not State law, thus depriving Oklahoma of the power to tax

the transitus of this property from the Osage Indian to his heir or devisee.

We reject at once as untenable the assertion that the title to this property remained in the Federal government under the various laws applicable to the Osages. Globe Indemnity Co. *v.* Bruce, 81 Fed. (2d) 143, and In re Martin's Estate, 183 Okl. 177, 80 P. 2d 561. It will not serve any purpose useful to a decision in this matter to undertake to determine precisely what aspect of title remained in the Federal government or was assumed by it as an instrumentality to further its supervision of and duty toward Osage Indians under the restrictive terms of the allotment laws and subsequent laws. The case of Oklahoma Tax Commission *v.* U. S., supra, definitely establishes the rule that the levying of a tax such as this on the devolution of property similarly affected does not interfere with the Federal government. There is a distinct difference between the situation of Osage Indians and their property, under the Acts applicable to them, and the allottee and the property involved in U. S. *v.* Rickert, 188 U. S. 432, 47 Law Ed. 532, as is pointed out in Oklahoma Tax Commission *v.* U. S., supra, Osage Indians are full citizens of the State of Oklahoma. Osage Indians have title to their allotments, to their aliquot parts of the mineral headright interests, and land sale trusts, and the accumulations from these sources in the Federal treasury. These properties are identifiable, subject to Constitutional and statutory protection, derive benefits for their owners, and pass by law at death. The title, if such it may be called, that rests in the Federal government is a mere instrument for service, whereas the title in the Indians is an individual, beneficial, and valuable thing.

We accept as final and binding upon us the rule in the Beaver case, above, that devolution of this property is by Federal and not State law. However, we cannot accept as logical the rule that because this is so, Oklahoma has no power to tax the transitus, either as an incident or with respect to the rights co-incident therewith or arising therefrom. It is pointed out by the State that the Federal government levies an inheritance tax on non-Indian citizens of Oklahoma although the devolution and transitus are by

virtue of Oklahoma law. It is generally recognized that the Federal Constitution is the supreme law of the land, and within the Federal field, Federal statutes control and no State authority exists or can intrude, and likewise for the State Constitution and its statutes. No one would contend that Federal authority exists to direct or interfere with Oklahoma's power to legislate on descent and distribution with respect to non-Indian citizens. Oklahoma may permit or forbid the devising or inheriting of property within its borders; it may permit succession on such terms as it chooses, and by what system. No Federal control may apply. If it is this power that gives rise to the right to levy an inheritance or succession tax, as indicated in the Beaver opinion, it may, with some degree of logic be asked by what authority does the Federal government tax our citizens in such instances?

Reconsideration of this problem caused the Supreme Court of the United States to say, in Oklahoma Tax Commission *v.* U. S., above:

> "It is true that our interpretation of the 1933 statute must be in accord with the generous and protective spirit which the United States properly feels toward the Indian wards, but we cannot assume that Congress will choose to aid the Indians by permanently granting them immunity from taxes which they are as able as other citizens to pay. It runs counter to any traditional concept of the guardian and ward relationship to suppose that a ward should be exempted from taxation by the nature of his status, and the fact that the federal government is the guardian of the Indian ward is no reason, by itself, why a state should be precluded from taxing the estate of the Indian. We have held that the Indians, like all other citizens, must pay federal income taxes. Superintendent of Five Civilized Tribes *v.* Commissioner of Internal Revenue, supra (295 U. S. 421, 79 Law Ed. 1520, 55 S. Ct. 820). 'Wardship with limited power over his property' did not there 'without more render (the Indian) immune from the common burden'. A federal court has held, in a well reasoned decision defended before us by the Solicitor General of the

United States, who is not a party to this action, that an Indian's estate is subject to the federal estate tax. Landman *v.* Commissioner of Internal Revenue (CCA 10th) 123 F. (2d) 787. Congress cannot have intended to impose federal income and inheritance taxes on the Indians and at the same time exempt them by implication from similar state taxes. "Congress has passed laws under which Indians have become full-fledged citizens of the State of Oklahoma. Oklahoma supplies for them and their children schools, roads, courts, police protection and all the other benefits of an ordered society. Citizens of Oklahoma must pay for these benefits. If some pay less, others must pay more."

All of this is summed up in that opinion in these words: "Recognizing that equality of privilege and equality of obligation should be inseparable associates, we have recently swept away many of the means of tax favoritism."

In that opinion reference was made to the fact the federal government is collecting from Indian wards an income tax and an estate tax. In this appeal, our attention has been called to the fact that the federal government collects an estate tax on Osage estates. The Treasury Department's act in collecting such tax is based upon (1) the nature of the title of the Osage Indian and (2) the power of the Osage Indian to pass this property at his death. There is nothing in any of the decisions called to our attention that indicates that a power to levy an estate tax in the case of its Indian wards that is not possessed by the State of Oklahoma. As we understand the rule of immunity from taxation by reason of the wardship exercised by the federal government over Indians, including restrictions on alienation, it means a lack of power in either government to tax, not simply that the federal government has such power and Oklahoma has not.

If the title to this property yet remains in the federal government, as contended by appellants, that government certainly would not tax its own property. Yet the record and decisions disclose that the federal government does exact an estate tax in these and similar instances. If the federal government does not regard its position as guardian

of the Indians as a bar to its exacting income and estate taxes from the Indians, it is a reasonable assumption that it does not look upon the protective restrictions placed around the Indians' property as affording tax immunity. The Supreme Court of the United States said in Oklahoma Tax Commission *v.* U. S., above, in referring to earlier federal court decisions establishing and extending tax immunity in favor of the Indian and his privies: "None of these cases hold, nor has this court ever decided, that congressional restriction of an Indian's income carried an implication of estate Tax exemption. * * * The immunity formerly said to rest on constitutional implication cannot now be resurrected in the form of statutory implication. * * * If Congress intends to prevent the State of Oklahoma from levying a general non-discriminatory estate tax applying alike to all of its citizens, it should say so in plain words. Such a conclusion cannot rest on dubious inferences. 'Non-taxability and restrictions upon alienation are distinct things.' "

While this last cited and quoted case involved the estates of Creek Indians whose allotments and restrictions on alienation and the management of property rest on different laws, the general tone of the court's language in that decision clearly support the Oklahoma Tax Commission in this case.

The Order of the Oklahoma Tax Commission is affirmed.

Concur: Riley, Osborn, Welch, Corn, and Davison, JJ.
Dissent: Hurst, V.C.J.

EXHIBIT "3"

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 31947

FLOYD O. YARBROUGH, Executor of Estate of Dora Neal Rector, Deceased, *Plaintiff in error*

vs.

OKLAHOMA TAX COMMISSION, *Defendant in Error*

and

No. 31948

MARY WEST, *Plaintiff in Error*

vs.

OKLAHOMA TAX COMMISSION, *Defendant in Error*

SYLLABUS

1. The estates of deceased full-blood, restricted Osage Indians, except the allotted homestead, are subject to the estate, or transfer, or inheritance tax levied by the State of Oklahoma under the provisions of 68 O. S. 1941, Sec. 988 et seq.,

2. Our former decision in the case of In re Estate of Nah-Me-Tse-He Childers *v.* Pope, 119 Okla. 300. 249 Pac. 726, is hereby expressly overruled in so far as that decision announces the rule that all of the estate of a deceased Osage Indian is exempt from the estate or inheritance tax authorized and levied by this state. The overruling of such decision subject however to the following provisions of prospective application only as to assessment and collection of such tax on other estates to the extent stated in the opinion.

3. A court of final decision, in overruling a prior adopted principle established by its own earlier decisions, may ordinarily in its discretion preserve in the overruling opinion all rights accrued under the prior declaration, the same

as if they had been created or arose out of a former existing statute later repealed by the Legislature.

4. This opinion shall operate prospectively only as to assessment and taxation of property of other estates affected hereby in the manner stated in the body of the opinion and for the reasons therein stated.

Appeal from the Oklahoma Tax Commission by Floyd O. Yarbrough, executor of estate of Dora Neal Rector, deceased, and by Mary West. Appeals consolidated.

Affirmed.

Frank T. McCoy, John T. Craig, and John R. Pearson, all of Pawhuska, and Frank Mahan of Fairfax, Oklahoma, For Plaintiffs in Error.

E. L. Mitchell and C. W. King, both of Oklahoma City, Okla., For Defendant in Error.

BAYLESS, J.:

These appeals from the Oklahoma Tax Commission involve only the issue of the power of the State of Oklahoma to levy and collect an estate, transfer, and inheritance tax under 68 O. S. 1941, Sec. 988, et seq. on the estates involved. Dora Neal Rector, a full-blood, allotted, restricted Osage Indian, died leaving an estate consisting of (1) allotted homestead land; (2) allotted surplus land and land inherited from other Osages; (3) 2 and 13/252nds Osage mineral headright interests; (4) cash in the hands of the United States Treasurer derived from the income from the headright interest; and (5) cash in the hands of the United States Treasurer representing her share of the sale price of tribal lands in Kansas. It is conceded the allotted homestead is nontaxable and the Commission made no order taxing it under the above statute. Charles West, Jr., a deceased minor, unallotted Osage Indian, left an estate consisting of (1) 1 and 919/2520ths Osage mineral headright interests; (2) land purchased with funds derived from the headright interests and land inherited from other Osages; (3) cash in the hands of the United States Treasurer representing accruals of income from the headright interests; (4) personal property purchased with funds derived from the headright interests; and (5) cash in the

hands of the United States Treasurer representing his share of the sale price of tribal lands in Kansas. These appeals are consolidated for presentation to us and decision. In addition to the briefs of the parties, briefs amicus curiae have been filed.

Before directing our attention to the specific issues argued, we will discuss an aspect of these cases that inheres in the position of appellant and is an assumption that underlies virtually all of their arguments. It is both asserted and implied that there is no reason, and there should be no disposition on the part of this court, to delve into this issue again. Briefly the main issue can be stated thus: No tax is due under an earlier decision of this court, to-wit: Childers *v.* Pope, 119 Okla. 300, 249 Pac. 726.

In that case it was held that the portion of the estate of a restricted Indian consisting of land and mineral interests was not taxable under Oklahoma law. However, this holding was not original with this court; there is no language in it that manifests a concurrence in the rationale of the rule adopted, and it is obvious the opinion was forcedly adopted by the controlling circumstance of an intervening opinion by the Supreme Court of the United States, to-wit: Childers *v.* Beaver, 270 U. S. 555, 70 L. ed. 730 (7). It will be observed in reading the Childers *v.* Pope opinion that the decision there was based solely on the rule of the Beaver case, supra, and in the Pope case this court remarked it was "not disposed to go further than the rule therein announced." (Beaver, supra), and expressly made subject to Oklahoma's taxing power, as, an exception to the rule of the Beaver case, the personal property of the estate.

One of the best of reasons for again going into this issue, since our independent judgment was obstructed earlier, is the recent review and revision by the Supreme Court of the United States of some of the rules of law of the earlier federal decisions on this branch of the law. The traditional federal court view of the nontaxability of the property of Indians is illustrated by United States *v.* Rickert, 188 U. S. 432, 47 L. ed. 532, and Childers *v.* Beaver, supra. The alteration in this view is disclosed by Shaw *v.*

Gibson-Zahniser Oil Corp., 276 U. S. 575, 72 L. ed. 709; Supt. etc., *v.* Comm. Int. Rev. 295 U. S. 418, 79 L. ed. 1517; United States *v.* Oklahoma Tax Commission, 131 Fed. 2d 635; Helvering *v.* Mountain Producers Corp., 303 U. S. 376; 82 L. ed. 907; Oklahoma Tax Commission *v.* United States, 319 U. S. 598, 87 L. ed. 1612, and the various decisions discussed therein.

In Oklahoma Tax Commission *v.* United States supra, it was stated: "Childers *v.* Beaver, 270 U. S. 555, 70 L. Ed. 730, 46 S. Ct. 387, supra, was in effect overruled by the Mountain Producers Corp., decision." This alteration is sufficient justification for the state's renewed effort, an effort regarded as serious and persistent in the opinion in Oklahoma Tax Commission *v.* United States, supra.

We reject at once as untenable the assertion that the title to this property remained in the federal government under the various laws applicable to the Osages. Globe Indemnity Co. *v.* Bruce, 81 Fed. 2d 143, and In re Martin's Estate, 183 Okla. 177, 80 P. 2d 561. It will not serve any purpose useful to a decision in this matter to undertake to determine precisely what aspect of title remained in the federal government or was assumed by it as an instrumentality to further its supervision of and duty toward Osage Indians under the restrictive terms of the allotment laws and subsequent laws. The case of Oklahoma Tax Commission *v.* United States, supra, definitely establishes the rule that the levying of a tax such as this on the devolution of property similarly affected does not interfere with the federal government. There is a distinct difference between the situation of Osage Indians and their property, under the acts applicable to them, and the allottee and the property involved in United States *v.* Rickert, 188 U. S. 432, 47 L. ed. 532, as is pointed out in Oklahoma Tax Commission *v.* United States, supra. Osage Indians are full citizens of the State of Oklahoma. Osage Indians have title to their allotments, to their aliquot parts of the mineral headright interests, and land sale trusts, and the accumulations from these sources in federal treasury. These properties are identifiable, subject to constitutional and statutory protection, derive benefits for their owners, and pass by law at death. The title, if such it may be called, that rests in the

federal government is a mere instrument for service, whereas the title in the Indians is an individual, beneficial, and valuable thing.

The Supreme Court of the United States said in Oklahoma Tax Commission *v.* United States, supra:

> "It is true that our interpretation of the 1933 statute must be in accord with the generous and protective spirit which the United States properly feels toward the Indian wards, but we cannot assume that Congress will choose to aid the Indians by permanently granting them immunity from taxes which they are as able as other citizens to pay. It runs counter to any traditional concept of the guardian and ward relationship to suppose that a ward should be exempted from taxation by the nature of his status, and the fact that the federal government is the guardian of the Indian ward is no reason, by itself, why a state should be precluded from taxing the estate of the Indian. We have held that the Indians, like all other citizens, must pay federal income taxes. Superintendent of Five Civilized Tribes *v.* Commissioner of Internal Revenue, supra (295 U. S. 421, 79 L. ed. 1520, 55 S. Ct. 820). 'Wardship with limited power over his property' did not there 'Without more render (the Indian) immune from the common burden.' A federal court has held, in a well reasoned decision defended before us by the Solicitor General of the United States, who is not a party to this action, that an Indian's estate is subject to the federal estate tax. Landman *vs.* Commissioner of Internal Revenue (C. C. A. 10th) 123 F. 2d 787. Congress cannot have intended to impose federal income and inheritance taxes on the Indians and at the same time exempt them by implication from similar state taxes.
>
> "Congress has passed laws under which Indians have become full-fledged citizens of the State of Oklahoma. Oklahoma supplies for them and their children schools, roads, courts, police protection and all the other benefits of an ordered society. Citizens of Oklahoma must pay for these benefits. If some pay less, others must pay more."

All of this is summed up in that opinion in these words:

"Recognizing that equality of privilege and equality of obligation should be inseparable associates, we have recently swept away many of the means of tax favoritism."

In that opinion reference was made to the fact the federal government is collecting from Indian wards an income tax and an estate tax. In this appeal our attention has been called to the fact that the federal government collects an estate tax on Osage estates. The Treasury Department's act in collecting such tax is based upon (1) the nature of the title of the Osage Indian, and (2) the power of the Osage Indian to pass this property at his death. There is nothing in any of the decisions called to our attention that indicates that the United States government has a power to levy an estate tax in the case of its Indian wards that is not possessed by the State of Oklahoma. As we understand the rule of immunity from taxation by reason of the wardship exercised by the federal government over Indians, including restrictions on alienation, it means a lack of power in either government to tax, not simply that the federal government has such power and Oklahoma has not.

If the title to this property yet remains in the federal government, as contended by appellants, that government certainly would not tax its own property. Yet the record and decisions disclose that the federal government does exact an estate tax in these and similar instances. If the federal government does not regard its position as guardian of the Indians as a bar to its exacting income and estate taxes from the Indians, it is a reasonable assumption that it does not look upon the protective restrictions placed around the Indians' property as affording tax immunity. The Supreme Court of the United States said in Oklahoma Tax Commission *v.* United States, above, in referring to earlier federal court decisions establishing and extending tax immunity in favor of the Indian and his privies:

"None of these cases held, nor has this court ever decided, that congressional restriction of an Indian's

income carried an implication of estate tax exemption. * * * The immunity formerly said to rest on constitutional implication cannot now be resurrected in the form of statutory implication. * * * If Congress intends to prevent the State of Oklahoma from levying a general non-discriminatory estate tax applying alike to all of its citizens, it should say so in plain words. Such a conclusion cannot rest on dubious inferences. 'Non-taxability and restrictions upon alienation are distinct things.' "

While this last-cited and quoted case involved the estates Creek Indians whose allotments and restrictions on enation and the management of property rests on dif- ent laws, the general tone of the court's language in that ision clearly supports the Oklahoma Tax Commission his case.

Since our former decision in Childers *v.* Pope, supra, was ed solely upon a following of the rule of Childers *v.* aver, supra, and since the Supreme Court of the United tes in reviewing various former decisions has itself "in ct overruled" Childers *v.* Beaver, we are at liberty to art from following it.

We conclude that the order of the Oklahoma Tax Commis- n should be affirmed, and this tax assessed against these ates to the extent heretofore stated.

The pronouncement of this rule and the overruling of lders *v.* Pope, supra, constitutes a definite change in application of this tax to certain property of estates. e result is that under this decision certain property of ates will be subject to this tax which under the former struction was not so taxable, and it is urged that we uld restrict this rule change to prospective effect only to other estates administered upon and closed prior to effective date of this decision. Upon that point, we erve that the rule of our former decision, following lders *v.* Beaver, was established in 1926, and under that e of non-liability of such estates to the tax here involved, s a matter of common knowledge, as well as judicial wledge that many estates have been administered upon l closed and titles vested with no thought that any such

tax liability existed and without any demand for or effort to collect such a tax; and that the stability of titles might be grievously affected unless we set at rest, or permit to remain at rest, any question as to the liability of any such estates for any such tax.

It is suggested on the part of the Tax Commission that no intention exists to undertake to surmount the apparent difficulties and to seek to apply this rule of taxability to such estates heretofore closed. We fully agree with the thought that no such effort should be made, and to that end, and for the reasons stated, we deem it our duty, and clearly within our authority, to give the aforesaid prospective effect only to this change in such rule. See Oklahoma County *v.* Queen City Lodge No. 197, I. O. O. F. 195, Okla. 131, 156, Pac. (2d) 340, and the many authorities therein cited.

It is therefore adjudged that this rule change is adopted for only prospective application to other estates so as not to apply to other estates administered upon and closed prior to the date of this opinion. For the reasons stated, and upon the consideration and conditions stated, the order of the Tax Commission is affirmed.

Davison, V.C.J., Bayless, Welch, Arnold and Luttrell, JJ: concur.

Riley, and Corn, JJ: concur in part and dissent in part, as to Prospective Operation Only.

Hurst, C. J., and Gibson, J., Dissent.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 31947

FLOYD O. YARBROUGH, EXR., et al., *Plaintiffs in Error,*

vs.

OKLAHOMA TAX COMMISSION, *Defendant in Error.*

No. 31948

MARY MORTON WEST, Osage Allottee, *Plaintiff in Error,*

vs.

OKLAHOMA TAX COMMISSION, *Defendant in Error.*

HURST, C. J. (Dissenting):

Two questions inhere in this case, (1) may Oklahoma levy an estate tax upon the transmission of property, the legal title to which is vested in the United States, and which is held in trust for the benefit of an Indian tribe, where the only right of the deceased Indian allottee is to receive his aliquot portion of the income from the trust property as the United States government may from time to time elect to distribute it in the absence of an Act of Congress authorizing such tax, and (2) did the Oklahoma Legislature intend to levy a tax upon the transmission of such right. I think both questions should be answered in the negative. We are not concerned with whether Congress should authorize such a tax to be levied, but rather whether it can be done without the consent of Congress.

1. The authorities relied upon in the majority opinion do not sustain the result reached. None of the cases relied upon involved a tax upon property held in trust by the United States for the benefit of its Indian wards. The Mountain Producers case, 303 U. S. 376, involved a tax upon the income of an oil and gas lessee of state lands, and it stands for the rule that the interest of the lessee is too remote to be protected from the levy under the rule exempting state instrumentalities from Federal taxation. The property in-

volved in the other cases relied upon was owned in fee by the individual Indians, but the alienation of such property was restricted. The Five Civilized Tribes case, 319 U. S. 598, recognizes the distinction between property owned in fee by individual Indians and property held in trust by the United States for their benefit, and cites United States *v.* Rickert, 188 U. S. 432, in making such distinction. The Rickert case has never been departed from. If, as there held, property held in trust by the United States for the Indian Allottee is not subject to state ad valorem taxation without the consent of Congress, it would seem that the State cannot levy an estate tax on its transmission by the death of the allottee, without the consent of Congress.

Our decision should be based upon sound legal principles, and not upon what we understand to be the "tone" or trend of the recent decisions of the United States Supreme Court in other tax cases not involving the precise question here involved. After all it is the function of Congress and not that of the Courts to declare the policy of the United States with reference to its Indian wards. No remote Federal instrumentality is here involved, but rather the United States Government itself. Congress has not provided a method of collecting the tax and has not authorized those having the custody of the funds held in trust to disburse them for such purposes. 25 U.S.C.A. #123 provides: "No money shall be expended from Indian tribal funds without specific appropriation by Congress." It is my view that until Congress expressly or by necessary implication authorizes the tax to be levied and collected, it cannot be done because of the implied immunity doctrine. The question of whether these headright interests are or may be taxed by the Federal Government is beside the point. The doctrine of implied immunity operates only to prevent one government from taxing the property or instrumentalities of another government, and does not prevent a government from taxing its own property or instrumentalities. 61 C. J. 361, 371; 51 Am. Jur. 279.

2. Both this court and the Federal courts are committed to the rule that the descent of property here involved is cast under the Federal statutes and not under the state statutes. See In re Pryor's Estate, — Okla. —, 181 P.

nd the cases there cited. Our estate tax statute
to cover only such property of the decedent as
by will or the intestate laws of this State." 68
1 #989. Estate and inheritance taxes are excise
nposed on the privilege of transmitting or receiv-
erty upon the death of the owner." 28 Am. Jur. 12.
61 C. J. 1592. Our Legislature did not express an
to levy an estate tax on the privilege of trans-
roperty under the laws of the United States, and
elementary that it could not constitutionally do so.
604, note 41; 28 Am. Jur. 16, 90; In re Estates of
, 83 Okla. 107, 204 P. 911, 42 A.L.R. 399; Frick
lvania, 268 U. S. 473, 69 L. Ed. 1058, 45 S. Ct. 603,
316.

e foregoing reasons, I respectfully dissent.

, J., concurs in this dissent.

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No. 489

In the Supreme Court of the United States

October Term 1947.

MARY MORTON WEST, OSAGE ALLOTTEE NO. 192,
Appellant,
vs.
OKLAHOMA TAX COMMISSION.

Appeal from the Supreme Court of the State of Oklahoma.

BRIEF of APPELLANT.

FRANK T. McCOY,
JOHN T. CRAIG,
JOHN R. PEARSON,
FRANK MAHAN,
Counsel for Appellant.

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1947.

No. 489

MARY MORTON WEST, OSAGE ALLOTTEE NO. 192,

Appellant,

vs.

OKLAHOMA TAX COMMISSION.

BRIEF *for* APPELLANT.

Opinion Below.

The Oklahoma Tax Commission, where the case originated, did not hand down an opinion, but entered an order from which an appeal was taken to the Supreme Court of Oklahoma (R. 15). The Supreme Court of Oklahoma handed down two opinions, the first of which was superseded by the second. Neither of said opinions appears in the official Oklahoma Reports, but both, together with a dissenting opinion, are printed in full in the transcript (R. 32, 39).

Jurisdiction.

The opinion and decision of the Supreme Court of Oklahoma was entered on October 28, 1947. Petition for allowance of appeal was filed and order allowing appeal entered on November 24, 1947. The decision below upheld the valid-

ity of the estate or inheritance tax law of the State of Oklahoma as applied to restricted Osage Indian estates, against the contention that as so applied the statute was repugnant to the Fourteenth Amendment to the Constitution of the United States, to an Osage treaty, and to laws of the United States relating to the Osage Tribe of Indians. The jurisdiction of this court rests upon Section 237(a) of the Judicial Code, as amended by the Act of February 13, 1925, and the Act of January 31, 1928 (28 U. S. C., Secs. 344 (a) 861a).

Statement.

This appeal presents the question of the right of the State of Oklahoma to levy an estate or inheritance tax against the estates of restricted Osage Indians, and more specifically the right to include in the estate as the measure of such tax property the title to which rests in the United States in trust for the Osage Tribe of Indians, and in which the restricted Osage Indian had no vested interest at the time of death.

The Oklahoma Tax Commission entered an order levying the tax (R. 8), and to such order a protest was filed raising the Federal question (R. 9). After hearing upon the protest the Commission again entered an order assessing the tax (R. 15), including in the net estate as the measure of the tax all items of property making up the estate, except the homestead.

By stipulation filed in the case (R. 12) it was agreed that the estate consisted of the following items of property:

1 and 919/2520ths Osage Indian mineral headrights	$ 10,235.12
(Never subjected to state taxation.)	
Trust funds in U. S. Treasury	4,745.52
Accrued interest thereon	398.90
(Neither ever subjected to state taxation.)	
Surplus funds in U. S. Treasury	29,046.27
(Never subjected to state taxation.)	
United States bonds, value at death	70,949.31
(Purchased with restricted funds and held by the United States in its treasury from funds accumulated from mineral headrights. Never subjected to state taxation.)	
Building and loan stock (purchased as bonds, *supra*)	1,485.06
(Never subjected to state taxation.)	
Real estate other than homestead in Osage County	12,226.10
(Taxed.)	
3/28ths interest in Masonic mortgage	1,071.43
(Purchased as bonds, *supra*. Never subjected to state taxation.)	
Purchased real estate in Osage County	5,000.00
(Taxed.)	
Tax exempt homestead	1,833.33
Restricted household furniture	736.00
(Purchased with funds accumulated from headrights. Not taxed.)	

It was further agreed by the stipulation that "Osage funds are paid to the United States Treasury and held by it undesignated as to members of tribe but simply as the Osage Tribal Trust Fund." (R. 13)

From the order of the Commission assessing the tax

an appeal was prosecuted to the Supreme Court of Oklahoma, where a petition in error was filed, again raising the Federal question (R. 1). That court, on October 28, 1947, handed down an opinion upholding the validity of the Oklahoma estate or inheritance tax statute as applied to all items of property composing the estate, except the homestead. From that decision this appeal is prosecuted.

The material parts of the Oklahoma statute (Secs. 988 to 989t, inclusive, Title 68, Oklahoma Statutes 1941) are as follows:

Section 989:

> "A tax, at the rates prescribed in Section 2 of this act, is hereby levied upon the transfer of the net estate of every decedent, whether in trust or otherwise, to persons, associations, corporations, or bodies politic, of property, real, personal, or mixed, whether tangible or intangible, or any interest therein or income therefrom, by will or the intestate laws of this state by any order setting apart property and/or granting family allowance pursuant to the probate code, by deed, grant, bargain, sale, or gift made in contemplation of the death of the grantor, vendor, or donor, or intended to take effect in possession or enjoyment at or after such death, whether made before or after the passage of this act. * * *"

Section 989e:

> "(A) The value of the gross estate used as a basis for the determination of the value of the net estate, shall be determined by including:
>
> "(1) The value at the time of the death of the decedent of all property, real, personal, or mixed, whether tangible or intangible, of which the decedent died seized or possessed, within the jurisdiction of this state, and any interest therein or income therefrom,

including the homestead in excess of Five Thousand ($5,000.00) Dollars, which shall pass to any person or persons, associations or corporations, in trust or otherwise, by testamentary disposition or by the laws of inheritance or succession of this or any other state or country,"

Section 989i:

"Taxes levied under this act shall be and remain a lien upon all the property transferred until paid, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of administration, allowed by the court having jurisdiction thereof, shall be divested of such lien. * * *"

History of Osage Treaties, Laws and Property.

By the Treaty of 1866 between the United States and the Cherokee Nation of Indians, (14 Stat. L. 799) the Cherokees ceded to the United States approximately one and one-half million acres of land lying north and east of the Arkansas River in Oklahoma, comprising what is now known as Osage County. Pursuant to that treaty, and in 1883, a deed was made and executed, with the Cherokees as first party and the United States as second party, by the granting clause of which it was provided that the first party,

"does by these presents grant, bargain, sell, remise, release, relinquish and confirm unto the said party of the second part, forever, in trust nevertheless and for the use and benefit of the said Osage and Kansas Indians,"

the lands above referred to and other lands. This deed is recorded in Book 6, page 482, Indian Deed Record, Department of the Interior, Washington, D. C.

By Act of Congress approved June 28, 1906 (34 Stat. L. 539) the surface only of the Osage lands was alloted in

severalty, whereby each of the 2,229 enrolled Osages received a homestead allotment of 160 acres and three allotments of surplus lands totaling 497 acres. That act provided for the issuance of certificates of competency, in the discretion of the Secretary of the Interior, and that upon the issuance of such certificate the surplus allotted lands should become subject to taxation, with the further proviso that such surplus lands should remain non-taxable for a period of three years except where a certificate of competency was issued or the allottee died. The homestead allotment was made non-taxable for a period of twenty-five years, or during the life of the homestead allottee.

It was further provided by that act that the oil and other minerals covered by the allotted lands were reserved for the use of the tribe for a period of twenty-five years, and that the same should become the property of the individual owner of the land at the expiration of the twenty-five year period, "unless otherwise provided for by Act of Congress."

The act further provided that all funds belonging to the Osage Tribe, and all moneys due or that might become due, should be held in trust by the United States for a period of twenty-five years from the first day of January, 1907. Provision was also made in that act for quarterly payment to the allottee of the interest on his *pro rata* share in the tribal funds, but there was no provision for the payment of the principal until the expiration of the trust period.

By successive acts of Congress referred to later in this brief this trust period has been extended to April 8, 1983, on the minerals, and to January 1, 1984, on lands, moneys, and other properties.

By the seventh paragraph of Section 2 of the Allotment Act (34 Stat. 539) it was provided:

"• • • That nothing herein shall authorize the sale of the oil, gas, coal, or other minerals covered by said lands, said minerals being reserved to the use of the tribe for a period of twenty-five years, and the royalty to be paid to said tribe as hereinafter provided; And provided further, That the oil, gas, coal and other minerals upon said allotted lands shall become the property of the individual owner of said land at the expiration of said twenty-five years, unless otherwise provided for by Act of Congress."

Section 5 of said act provides:

"That at the expiration of the period of twenty-five years from and after the first day of January, nineteen hundred and seven, the lands, mineral interests, and moneys, herein provided for and held in trust by the United States shall be the absolute property of the individual members of the Osage Tribe, according to the roll herein provided for, or their heirs, as herein provided, and deeds to said lands shall be issued to said members, or to their heirs, as herein provided, and said moneys shall be distributed to said members, or to their heirs, as herein provided, and said members shall have full control of said lands, moneys, and mineral interest, except as hereinbefore provided."

By Act of Congress approved March 3, 1921, (41 Stat. 1249), the trust period was extended to 1946, and by Act of Congress approved March 2, 1929 (45 Stat. 1478), the trust period was again extended to 1958. The last extension was by Act of Congress approved June 24, 1938, (52 Stat. 1034), the material parts of Section 3 thereof being as follows:

"That all that part of the Act of June 28, 1906 (34

Stat. L. 539) * * * which reserves to the Osage Tribe the oil, gas, coal, or other minerals, covered by the lands for the selection and division of which provision is made in that act is hereby amended so that the oil, gas, coal, or other minerals covered by said lands are reserved to the Osage Tribe, until the 8th day of April, 1983, unless otherwise provided by Act of Congress * * *.

"The lands, moneys, and other properties now or hereafter held in trust or under the supervision of the United States for the Osage Tribe of Indians, the members thereof, or their heirs and assigns, shall continue subject to such trusts and supervision until January 1, 1984, unless otherwise provided by Act of Congress."

By Section 3 of the Act of Congress approved March 3, 1921 (41 Stat. L. 1249) it was provided:

"That all members of the Osage Tribe of Indians are hereby declared to be citizens of the United States, but this shall not affect their interest in tribal property or the control of the United States over such property as is now or may hereafter be provided by law * * *."

Specification of Errors.

I. The Supreme Court of Oklahoma erred in affirming the order and judgment of the Oklahoma Tax Commission, for the reason that in applying the Oklahoma estate or inheritance tax law to the estate of a restricted member of the Osage Tribe of Indians and to property of such estate the title to which is in the United States in trust for such restricted Osage Indian the judgment of said court is in direct conflict with former decisions of the Supreme Court of the United States and of Federal District Courts and Circuit Courts of Appeals in similar cases.

II. Said court erred in affirming the order and judgment of the Oklahoma Tax Commission, for the reason that the United States Government holds the

property involved under a trust established by treaty and by Acts of Congress imposing upon the Government the duty to deliver the corpus of the trust property to the individual members of the Osage Tribe at the end of the trust period. Application of the Oklahoma estate or inheritance tax law to such property and the exaction of the tax thereby provided for would interfere with such governmental duty and diminish the trust estate.

III. Said court erred in affirming the order and judgment of the Oklahoma Tax Commission, for the reason that the corpus of such trust property does not become the property of the individual member of the Osage Tribe until the termination of the trust period, and the imposition of the Oklahoma inheritance or estate tax which includes in its measure property which was not the property of the decedent at the time of his death constitutes a denial of due process of law and of the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

IV. Said court erred in affirming the order and judgment of the Oklahoma Tax Commission, for the reason that the immunity from state taxation of property held in trust by the United States for Osage Indians has never been withdrawn by Congress by any act granting express permission to the State of Oklahoma to levy the tax in controversy.

Inasmuch as our argument will follow closely the points presented by the above assigned errors, we feel that any effort at summarizing the argument to be made in this brief would be of little assistance to the court, and that we may best avoid unnecessary repetition by omitting a summary.

ARGUMENT.

I.

The decision below is legally erroneous and in irreconcilable conflict with prior decisions of this Court and other Federal courts.

In the opinion of the Supreme Court of Oklahoma it is said that, "We reject at once as untenable the assertion that the title to this property remained in the Federal Government under the various laws applicable to the Osages." This holding is contrary to the stipulation of the parties to the case, to the deed from the Cherokee Indians to the United States, to the Acts of Congress relating to the Osages, and to various decisions of the Federal Courts.

The stipulation provided (R. 13) that title to the mineral interest involved "has been, is and will be held in trust by the United States until 1984 or such further time as Congress may provide." As pointed out in the above statement of facts, the deed from the Cherokees to the lands comprising the present Osage reservation was to the United States as the party of the second part, in trust for the use and benefit of the Osage and Kansas Indians. The Osage Allotment Act, quoted from above, provided that the minerals underlying the Osage reservation were to be reserved to the use of the tribe for a period of twenty-five years and should become the property of the individual owner of the land at the expiration of such period, "unless otherwise provided by Act of Congress." The reservation of the minerals to the Osage Tribe has been extended until the 8th day of April, 1983 (52 Stat. 1034).

Under the 1906, or Allotment Act, there was a severance of the surface rights and the mineral interest, the

surface being allotted in severalty to members of the tribe and title to the mineral interest remaining in the United States in trust for the tribe. In *Taylor* v. *Tayrien*, 51 F. (2d) 884, a bankruptcy case, the Tenth Circuit Court of Appeals pointed out that the 1906 Act made no allotment of the mineral estate, but that it remained tribal property. In concluding that the Osage headright owned by the bankrupt did not pass to the trustee in bankruptcy, that court held that "an Osage Indian has no present property right in the properties now owned by the tribe."

In *McCurdy* v. *United States*, 264 U. S. 484, 68 L. ed. 801, this court held that the title to Osage lands was in the United States just prior to the time deeds were executed and delivered to the individual Indians, and since there has been no allotment of the mineral estate it necessarily follows that title thereto still remains in the United States.

In *Adams* v. *Osage Tribe of Indians*, 50 F. (2d) 918, certain owners of lands in Osage County, Oklahoma, sought to quiet the title to the oil, gas and other minerals under the lands owned by them. About the same time the United States brought a similar suit against the plaintiffs in the other cases, and on appeal to the Tenth Circuit Court of Appeals (*Adams* v. *Osage Tribe of Indians*, 59 F. (2d) 653) that court said in the opinion:

> "• • • The United States alleges that it is the owner of all of said minerals holding them in trust for the use and benefit of the Osage Tribe, having acquired the same by deed from the Cherokee Nation pursuant to certain Acts of Congress."

The court also pointed out that—

> "• • • The bills in the three suits were dismissed, and in the one brought by the United States decree was

entered adjudging the minerals to be the property of the Osage Tribe, title to which is held in trust by the United States for the tribe's use and benefit."

The decrees of the District Court were affirmed, thus approving the holding of the trial court that title to the minerals is in the United States. (Certiorari denied, 287 U. S. 652, 77 L. ed. 563.)

As to the "trust funds" involved, it will be noted that it is stipulated (R. 13) that "these funds have been held by the United States since before the Act of 1906 (34 Stat. 539), and have never been subjected to taxation." The trust under which these funds were held was provided for by treaty between the United States and the Great and Little Osage Indians entered into in 1865 (14 Stat. L. 687), by the terms of which the proceeds of the sale of Osage lands in Kansas were to be placed in the Treasury of the United States to the credit of the tribe. Provisions for the carrying into effect of the terms of this treaty were made by Act of Congress approved June 16, 1880. (21 Stat. L. 291)

Reference to the protest and to the stipulation filed in the case will disclose that all other items of personal property concerning which protest is made to the inclusion thereof in the gross estate for purposes of inheritance or estate tax consist either of funds accumulated from the headrights or mineral interests, or securities or other personal property purchased with such funds by the United States and held in the United States Treasury. (R. 9-12) It likewise will be seen that by the stipulation it is agreed that each of these items of personal property has never been subjected to taxation.

The case of *United States* v. *Thurston County*, 143

Fed. 287, was decided by the Eighth Circuit Court of Appeals a little more than three months prior to the passage of the Osage Allotment Act. In that case the United States had filed a bill to prevent Thurston County, Nebraska, from collecting taxes from certain Omaha and Winnebago Indians. In an opinion by SANBORN, C. J., it was held that not only was the land which had been held in trust by the United States exempt from all state and county taxes, but that the proceeds of the sales of such lands were subject to the same trust and therefore to the same rule of exemption. The court there said that, "The substitutes partake of the nature of the originals, and stand charged with the same trust." It is, therefore, the contention of the appellant in this case that the title to funds accumulating from the Osage mineral interest is likewise in the United States and charged with the same trust under which the minerals are held.

Furthermore, Section 4 of the Allotment Act, *supra*, provided that all such funds should be held in trust by the United States for a period of twenty-five years, and that period is now extended until January 1, 1984, unless otherwise provided by Act of Congress. (52 Stat. 1034, Sec. 3.)

Even the Supreme Court of Oklahoma has held that title to the income accruing to an Osage headright is in the United States. In *McKnight* v. *Panther*, 190 Okl. 127, 120 P. (2d) 973, that court held that a check drawn on the United States Treasury for a quarterly annuity payment to a half-blood Osage Indian having a certificate of competency was not subject to execution by a creditor of such Indian. In the opinion the court said:

> "At the time of the issuance of said check, title to the fund on which it was drawn was in the Federal Government as trustee for the Osage Tribe of Indians.

> The delivery of the check to the defendant did not transfer to him title to any portion of said fund. * * * The title to the fund still remained in the Government until such time as the check was presented for payment and properly cleared."

In view of the foregoing it is submitted that the holding of the court in the present case that title to the headrights, to the funds known as "trust funds," to funds accumulating in the United States Treasury from the Osage mineral interest, and to securities in which such funds have been invested by the United States is not in the United States is contrary to both fact and law. It is only these classes of property involved in the estate about which any contention is being made. It was agreed by the stipulation (R. 13) that none of these classes of property had ever been subjected to taxation. Those classes of property designated in the stipulation as "taxed" are conceded to be properly includable in the gross estate for purposes of estate or inheritance taxes, and our argument is addressed only to the other items.

We believe it is apparent from the opinion below that the Supreme Court of Oklahoma found it necessary to dispose of the question of title in the manner it did in order to hold the above classes of property taxable. If title thereto was and is in the United States, then decisions of this court and other Federal Courts seem to be an insuperable barrier to state taxation.

At this point attention should be called to certain definite and vital distinctions between the present case and the case of *Oklahoma Tax Commission* v. *United States,* 319 U. S. 598, 87 L. ed. 1612, inasmuch as the latter case involved the identical state statute here under consideration, but as

applied to property of members of the Five Civilized Tribes. We suggest the following points of distinction:

1. Title to all classes of property in controversy in this case is in the United States, while in the *Five Tribes* case the Indians involved owned in fee not only the surface of the land but the minerals as well.

2. By Act of Congress relating to the Indians involved in the *Five Tribes* case the minerals, including oil and gas, were made "subject to all state and federal taxes as provided in Sec. 3 of the Act approved May 10, 1928 (45 Stat. 495, c. 517)." (47 Stat. 777.) No such permission has ever been granted by Congress to the State of Oklahoma respecting the mineral interest of the Osage Tribe or tribal funds accumulating therefrom, and by stipulation in this case it has been agreed that the various classes of property involved have never been subjected to taxation. (R. 13)

3. The various classes of property involved in this case are held in trust. No transfer of the corpus takes place upon the death of a restricted Osage Indian. The sole and absolute control of the corpus of the trust property and of the duration of the trust period itself is in the trustee.

4. The classes of property involved herein are tribally owned. They do not become the "absolute property of the individual members of the Osage Tribe" until the termination of the trust period, as presently fixed or as may hereafter be further extended. (Section 5 of 1906 Act.) In contrast, the property involved in the *Five Tribes* case was individually owned.

5. In the *Five Tribes* case the Government advanced but two contentions, neither of which is being made in the present case. It was urged in that case (1) that Oklahoma did not intend to tax estates of members of the Five Tribes,

and (2) that restrictions placed by Congress on the alienation of Five Tribes property operated to exempt such property from the Oklahoma estate tax. We submit that the contentions made in the present case are far more serious and more substantial.

6. The classes of property involved herein being held in trust by the United States, the opinion in the *Five Tribes* case itself points to the distinction between that case and this. Referring to the lands of members of the Five Tribes the court said in that case that, "Their lands are held in fee, not in trust, as in the *Rickert* case." The doctrine of the *Rickert* case (*United States* v. *Rickert*, 188 U. S. 432, 47 L. ed. 532) clearly was not repudiated in the *Five Tribes* case, and would seem to be decisive if applied in the present case.

We therefore respectfully urge that the *Five Tribes* case is in no wise determinative of the present case.

We do not understand from the opinion of this court in the *Five Tribes* case that the court there treated or intended to treat the case of *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376, 82 L. ed. 907, as having discarded for all purposes the Federal instrumentality theory, nor do we believe the opinion in the *Mountain Producers Corp.* case may be so understood. In that case the court merely disapproved the prior expansion of the doctrine beyond its proper limits, and held that a tax laid upon the profits made by a lessee of Indian lands had only a remote, if any, "influence upon the exercise of the functions of government." The view we here express as to the scope of the holding in the *Mountain Producers Corp.* case finds ample support in the case of *United States* v. *Allegheny County*, 322 U. S. 174, 88 L. ed. 1209, decided some six years after the decision in

the *Mountain Producers Corp.* case. In the *Allegheny County* case the court held that, regardless of the fact that in such cases as *Mountain Producers Corporation* the court had sharply curtailed the doctrine of implied delegated immunity, it had never departed from the basic doctrine that the properties, functions, and instrumentalities of the Federated Government are immune from all forms of state taxation, nor had it wavered in its application.

The doctrine of the *Rickert* case, *supra*, that Indian property held in trust by the United States is constitutionally exempt from state taxation, was applied to Osage property in *McCurdy* v. *United States*, 264 U. S. 484, 68 L. ed. 801. In that case an effort was being made by the taxing officials of Osage County, Oklahoma, to tax Osage lands which had been allotted but deeds to which had not been signed and approved until after the taxing date of the year for which it was sought to levy the tax. Under these circumstances it was held:

> "Title was in the United States on the date as of which the assessment was made, and did not pass until the execution and delivery of the deeds (Sec. 8). The lands were not taxable while held in trust by the United States." (Citing the *Rickert* case.)

The *Rickert* case was also followed by the Eighth Circuit Court of Appeals in the *Thurston County* case, *supra*.

As late as 1943, in *Mahnomen County* v. *United States*, 319 U. S. 474, 87 L. ed. 1527, the doctrine of the *Rickert* case was mentioned without criticism but on the other hand with seeming approval.

On October 10, 1944, the Tenth Circuit Court of Appeals handed down an opinion in the case of *United States* v. *Board of Com'rs*, 145 F. (2d) 329. Writ of certiorari was

denied by this court January 29, 1945. In that case Fremont County, Wyoming, was seeking to tax certain lands which had been purchased with funds belonging to Indians. Title to the lands had been taken in the United States in trust for the Indians. It was held that where the legal title is in the United States lands are not subject to state or county taxes, even though the title is merely held in trust for an Indian or a tribe. The *Rickert* case and the *McCurdy* case, *supra*, were cited as authority. In distinguishing the case from the *Five Tribes* case and other similar cases the court said: "But in all of these cases title to the land was in the Indian, not the United States."

Likewise, in *United States* v. *Mummert*, 15 F. (2d) 926, the *Rickert* and *Thurston County* cases were distinguished on the ground that in those cases the legal title to the property sought to be taxed was in the United States, whereas, "In the case at bar the title is not in the United States, but directly in the Indians."

The opinion in the *Rickert* case was handed down in 1903. As before pointed out, twenty years before that time the lands comprising the Osage reservation, including the minerals thereunder, had been conveyed to the United States in trust for the Osage Tribe. The Allotment Act of 1906 expressly declared the trust character of "all funds belonging to the Osage tribe, and all moneys due, and all moneys that may become due." The opinion in the *Thurston County* case was handed down a few days prior to the approval of the Allotment Act, and the opinion in the *McCurdy* case in 1924. It thus appears that since these three opinions Congress has passed both the 1929 Act and the 1938 Act, each of which specifically declares that Osage property of the kind here under consideration shall continue subject to such trust.

Hence, in this case we are not dealing simply with congressional silence after judicial construction of a statute (*Helvering* v. *Hallock*, 309 U. S. 106, 84 L. ed. 604), but with the affirmative action of Congress in extending an active trust over Indian property after the courts had repeatedly declared that property so held in trust by the United States for Indians is exempt from state taxation. And while we would not be so presumptuous as to assert that this situation should "debar this court from reexamining its own doctrines" (*Helvering* v. *Hallock, supra*), we do submit that repeated re-enactment of the statute under such circumstances should be most persuasive of the view that Congress was satisfied with previous holdings of the courts that property the title to which is held in trust by the United States for Indians is not subject to state taxation.

The lower court appears to have been influenced largely by the fact that the restricted Osage Indian enjoys the income from the trust estate. However, in all of the Indian cases above discussed the beneficial interest in the property was in the Indian, but that fact was no obstacle to the application of the rule that property held in trust for Indians is not subject to state taxation. In the *Allegheny County* case, *supra*, it was pointed out that the contention there made, that the tax affected only private persons, was likewise made in *Van Brocklin* v. *Anderson*, 117 U. S. 151, 29 L. ed. 845, but that it was held that the immunity protected the private owner. Again in the *Allegheny County* case the court referred to the *Rickert* case as subsisting authority.

II.

The imposition of the tax in controversy would interfere with the Government's duty to the Osage Indians by diminishing the trust estate.

Section 4 of the Allotment Act (34 Stat. 539) provides that all moneys of the Osage Tribe of Indians shall be held in trust for a period of twenty-five years from January 1, 1907, and Section 5 provides that at the expiration of the trust period the properties so held in trust shall be the absolute property of the individual members of the tribe. Thus the Federal Government owes a solemn duty to the Osage Indians to deliver to them at the end of the trust period the trust estate unimpaired and undiminished. This it cannot do, if each successive time the corpus of the trust property theoretically passes from one Osage Indian to his heirs the State is permitted to dip into the corpus, or what is left of it after prior like exactions, and thus frustrate the fiat of Congress that the property "shall be the absolute property" of the individual Osage at the termination of the trust period.

We say "theoretically passes," because so far as the corpus of the trust property is concerned, all the restricted Osage Indian has, and all he passes on to his heirs, is the right to certain income from the trust estate so long as the property continues to be held in trust by the Federal Government. This was pointed out in *McCurdy* v. *United States*, 246 U. S. 263, 62 L. ed. 706, wherein Mr. Justice BRANDEIS, speaking for the court, said:

> "* * * If the Secretary refused to issue the certificate, the allottee would (unless the certificate were granted later) remain, until the end of the twenty-five year period, in the enjoyment of the income merely; and at the end of that period, he or his heirs, though

unaccustomed to the control of property, would get absolute dominion at one time over the (*a*) homestead, (*b*) surplus lands, (*c*) the trust fund ($3,928.50), and (*d*) his share of the interest in the oil, gas, coal and mineral rights."

Section 989f, Title 68, Oklahoma Statutes 1941, pro- s for the exemption from estate taxes of "property ing to the deceased by inheritance, legacy or gift from revious estate within five years prior to the death of deceased and upon which previous estate the full in- tance and transfer taxes had been paid." With the t period on the minerals presently extended until 1983 the trust period on all other classes of Osage property held in trust extended until 1984, it would be possible these classes of property to pass through as many as different Osage estates, and each successive estate not the benefit of the exemption provided for in the above tioned statute. Yet the heirs to not one of those estates cept the one at the end of the trust period at some whol- definite time in the future—would inherit or obtain by of the deceased any more than the right to receive the ne from the property during their lifetime. The suc- ve exactions of estate taxes under such circumstances d result in diminishing the trust estate and thus defeat bligation assumed by the Federal Government to de- the trust property to the Osage Indian or his heirs at nd of the trust period. We say the termination of rust period is wholly indefinite for the reason that Con- heretofore has three times extended the trust period, nay further extend it.

The Osage Allotment Act provided that accrued in- t and oil royalties should be paid to the Osages quar- (34 Stat. 539, Sec. 4; *Work* v. *United States, ex rel.*

Mosier, 261 U. S. 352, 67 L. ed. 693). By the 1921 Act, however (41 Stat. L. 1249), Congress provided that so long as the income should be sufficient the adult Osage Indian without a certificate of competency should be paid $1,000.00 quarterly. This provision continued until by the 1938 Act (52 Stat. 1034) Congress provided that where the restricted Osage had surplus funds in excess of $10,000.00 he is to be paid $1,000.00 quarterly, but if he has surplus funds of less than $10,000.00 he shall receive quarterly only his current income, not to exceed $1,000.00 quarterly.

Thus it will be seen that not only the distribution of the surplus but likewise distribution of the income from the tribal property is subject to the will of Congress. The present commuted value of an Osage headright, which includes the mineral interest, trust funds and interest on trust funds, and the right to participate in bonuses and royalties until the end of the trust period, certainly is not a proper yardstick by which to measure the value of that which a particular deceased restricted Osage Indian passes on to his heirs or the value of that which the heir receives, when in truth and in fact neither ancestor nor heir has any control over the corpus of the property, and participation in the income itself is subject to the will of Congress.

It would seem that the same rule that has been applied in bankruptcy proceedings involving Osage Indians would be applicable to taxation by the State of Oklahoma. The case of *In re Denison*, 38 F. (2d) 662, involved the bankrupt estate of a member of the Osage Tribe of less than half blood and having a certificate of competency. And even as to an Osage Indian of that class, in speaking of the effect of the issuance of a certificate of competency VAUGHT, D. J., said:

"This does not, even by implication, empower him to sell his interest in a trust estate. Congress has provided that at the termination of the trust period, whenever it may be, that the interest of the individual Indian shall be delivered to him intact. *United States* v. *Thurston County*, (C. C. A.) 143 F. 287. Could Congress do this if taxes could attach or if liens could attach by virtue of judgments and obligations of any character?"

We have set out the provision of the Oklahoma statute (Sec. 989i) providing for a lien of the taxes upon the property transferred. In our judgment the effort of the State to place a lien upon property in the hands of the general government, the title to which is in the general government, and which the general government holds in trust for an Indian tribe is directly contrary to the federal instrumentality theory.

In *United States* v. *Board of Com'rs of Osage County*, 193 Fed. 485, in holding that by the 1906 Act, Congress had removed the tax exemption from surplus Osage lands, COTTERAL, D. J., said:

"* * * By this holding, however, is not meant that the interest in the minerals reserved to the tribe is subject to taxation. Every sale of this interest is declared unauthorized, and it must be immaterial whether accomplished by the voluntary act of the allottee or by the involuntary process of taxation. The reservation of this interest for the use of the tribe is an instrumentality, not only employed by the United States in carrying out a governmental policy, but expressly reserved from sale for the period of 25 years. And this title and right of the tribe is not the subject of assessment, tax levy, or sale, and will not pass or be vested in any grantee by an attempted sale or transfer."

This holding of the District Court was approved by the

Eighth Circuit Court of Appeals in *United States* v. *Board of Com'rs,* 216 Fed. 883, 886, in the following language:

> "We agree with the views expressed by the trial court that oil, gas, coal, and other minerals contained in allotments to Osage Indians, do not pass by the allotment or become subject to taxation. They are expressly reserved to the tribe. This restriction is imposed by the nation. No act or omission of the Indians or of state authorities can impair it."

By analogy the cases of *Choate* v. *Trapp,* 224 U. S. 665, 56 L. ed. 941, and *Carpenter* v. *Shaw,* 280 U. S. 363, 74 L. ed. 478, are authority for the view that the undertaking of the trustee, the United States, that the classes of property in question "shall be the absolute property" of the individual Indian at the end of the trust period became a vested right in the Osage Indian which may not be impaired or taken away through the means of state taxation. While in the cited cases the vested right was to an express tax exemption, we urge the point that the result would be the same whether the tax infringed directly upon the vested right to tax exemption or upon the right to have the trust estate become the absolute property of the Osage or his heirs at the termination of the trust period—a period subject to continued extension by Congress.

Another analogous case is *United States* v. *Ferry County,* 24 F. Supp. 399. In that case the trust patent issued to the Indian declared that the United States would hold the land in trust for a period of twenty-five years, and at the end of the trust period would convey the land to the Indian by patent in fee "discharged of said trust and free from all charge and incumbrance whatsoever." The court held that "The United States as trustee may not liquidate the trust without the consent of the allottees."

No Act of Congress can be pointed to as giving to the State of Oklahoma permission to levy the tax in controversy, and under the doctrine of the above cases even Congress itself could not grant such permission and thus deprive the Osage Indian of his vested right to have the corpus of the trust property delivered to him or his heirs at the termination of the trust period.

It will be seen that the Supreme Court of Oklahoma in its opinion placed a great deal of emphasis upon what was said to be the fact that the Federal Government collects an estate tax upon Osage estates, and it is intimated in the opinion that the record in the cases indicates that such is the fact. There is nothing in the record to show that the Federal Government collects such a tax, and no decision of any court involving the question can be pointed to as holding that the United States has the right to collect such a tax upon Osage estates. If officials of the Federal Government are collecting such a tax on Osage estates and including in the gross estate as a part of the measure of the tax property of the classes under consideration in this case, that fact alone is not conclusive of their legal right so to do. For some years federal tax-collecting officials collected a federal income tax from restricted Osage Indians, until the Tenth Circuit Court of Appeals, in *Blackbird* v. *Commissioner of Internal Revenue*, 38 F. (2d) 976, held that the income of such Indians is not liable for federal income tax. Since that decision the Treasury Department has reimbursed restricted Osages for huge sums collected as income taxes prior to the decision.

Nor would it necessarily follow, as concluded in the opinion below, that if the Federal Government has the right to collect such a tax, the State of Oklahoma has an equal

right. In *New York* v. *United States*, 326 U. S. 572, 577, 90 L. ed. 326, 331, it was pointed out that:

> "* * * The considerations bearing upon taxation by the states of activities or agencies of the Federal Government are not correlative with the considerations bearing upon Federal taxation of state agencies or activities. The Federal Government is the government of all the states, and all the states share in the legislative process by which a tax of general applicability is laid. 'The taxation by the state governments of the instruments employed by the general government, in the exercise of its powers,' said Mr. Justice BRADLEY, 'is a very different thing. Such taxation involves an interference with the powers of a government in which other states and their citizens are equally interested with the state which imposes the taxation'."

By the Oklahoma Enabling Act (34 Stat. L., pp. 267-278) it was provided that in the Constitution of Oklahoma thereafter to be adopted nothing therein contained should be construed to limit or affect the authority of the Government of the United States to make any law or regulation respecting Oklahoma Indians, their lands, property or other rights by treaties, agreement, law or otherwise. Hence the State of Oklahoma is in no position to question the authority of the United States to continue to hold the restricted Osage's property in trust, to extend the trust period from time to time, and to undertake to deliver such property to the Osage Indian or his heirs at the end of the trust period.

III.

As applied to the classes of Osage property in controversy, the Oklahoma inheritance or estate tax law results in a denial of due process of law and of the equal protection of the laws.

The classes of property which we contend are not properly includable in the gross estate for estate tax purposes, as they appear in the stipulation (R. 13) may be stated briefly as follows:

1. Osage headrights.

2. Trust funds.

3. Surplus funds, being accumulated income from headrights.

4. United States Bonds, other securities and other personal property purchased and held by the United States from surplus funds.

It is our contention that owing to the trust under which these classes of property are held, the corpus thereof is not owned by the restricted Osage Indian in such sense that it is properly includable as a part of his gross estate for estate tax purposes. Under the trust period as now extended the Osage mineral estate does not become the property of the individual Osage until the 8th day of April, 1983, and other properties and moneys now held in trust until January 1, 1984. In *Hoeper* v. *Tax Commission*, 284 U. S. 206, 76 L. ed. 248, this court said, "That which is not in fact the taxpayer's income cannot be made such by calling it income." So it likewise may be said that the corpus of property which is not in fact the taxpayer's cannot be made such by giving to the taxpayer or the taxpayer's ancestor the right to make a will, when in fact all that passes by the will of the deceased person, or all that descends from him under

the law of succession, is the right, not to the corpus, but merely to certain income therefrom dependent upon the will of Congress.

The first Oklahoma inheritance tax statute was enacted in 1915 (Session Laws of 1915, chapt. 162). Thus, before Oklahoma became a state, and long before the State had an inheritance tax law of any kind, Congress had provided that the classes of property under discussion should become the absolute property "of the individual members of the Osage Tribe * * * or their heirs" at the expiration of the trust period. The decedent in the present case did not create the trust. No transfer of the corpus of the trust property was effected by his death. As said by Mr. Justice HOLMES, speaking for this court in *Brooke* v. *City of Norfolk*, 277 U. S. 27, 72 L. ed. 767,

> "* * * The assessment is a bare proposition to make the petitioner pay upon an interest to which she is a stranger. This cannot be done."

We are not here dealing with a transfer in trust with reservation of a life income to the settlor. In a recent decision by the Supreme Court of Oklahoma (*In re Protest of Bass*, 18 Oklahoma Bar Journal, 1793; not officially reported) it was held that the corpus of trust property is includable for inheritance tax purposes where the decedent, in setting up the trust, had retained for himself the income from the property during his lifetime. But the Oklahoma statute is directed at such transfers only where the decedent created the trust and reserved to himself a life income from the property, or in other words, at *inter vivos* transfers resorted to as substitutes for wills. The Oklahoma statute does not, and we know of no statute anywhere that does, undertake to require the inclusion in the gross estate for inheritance tax purposes of the corpus of trust property

where the trust was created by the United States Government and where the ultimate transfer of the corpus is postponed until the indefinite termination of the trust period—indefinite because wholly dependent upon the will of Congress. Nevertheless, the statute has been so applied, and we think the application is in direct violation of the Fourteenth Amendment to the Constitution of the United States.

In the case *In re Protest of Bass, supra,* the Supreme Court of Oklahoma stated that:

> "In 1933, soon after the decision in *May* v. *Heiner* was rendered, the Oklahoma Legislature amended the law so as to levy the inheritance or succession tax upon transfers 'where the decedent reserved to himself, during his life, the income from property included in any such transfer'."

As pointed out above, the decedent in the present case did not make a reservation of income to himself, and the statute therefore does not purport to cover the estate involved herein.

There seems to be divergence of opinion as to whether *May* v. *Heiner,* 281 U. S. 238, 74 L. ed. 826, was overruled or departed from in *Helvering* v. *Hallock,* 309 U. S. 106, 84 L. ed. 604 (see *Helvering* v. *Proctor,* 140 F. (2d) 87), but as we understand *Helvering* v. *Hallock,* the only departure from the doctrine of *May* v. *Heiner* was because of the effect of the Joint Resolution of Congress of March 3, 1931, chap. 454, 46 Stat. at L. 1516. The basic doctrine of that case still would apply in the present case, since the statute under consideration does not purport to cover a situation such as that here involved; nor, in our judgment, would it be within the constitutional power of a state to enact an inheritance tax law which would require the inclusion in the

estate of a decedent for estate tax purposes of property not that of the decedent.

The proposition being urged under this point of our brief, it will be observed, is not an Indian question. The tenure of Osage property of the classes being discussed is comparable to a situation where successive life estates might be left to successive life tenants, with no power in the life tenant to sell, appropriate to his own use, or control in any manner the ultimate disposition of, the corpus of the property itself. Under such circumstances, upon the death of a particular life tenant, whether Indian or white, his interest in the property, as said in *May* v. *Heiner*, would be "obliterated by that event." Regarding Osage property the court pointed out in *Taylor* v. *Tayrien, supra*, that, "The right to control descent, either with or without a will, has been exercised by Congress, and may be further exercised."

In *Commissioner* v. *Irving Trust Co.*, 147 F. (2d) 946, the Circuit Court of Appeals, Second Circuit, said:

> "We have found no decision in which a settlor has parted with power to control the application of any part of the corpus and the disposition of it is left to the judgment of the trustee, independent of any prescribed standards, and yet the corpus has been included in the estate because the settlor might receive a part of the corpus through the exercise of an uncontrolled discretion by the trustee."

Under Section 3 of the Act of Congress approved March 2, 1929 (45 Stat. 1478) the Secretary of the Interior may, in his discretion, pay all or any part of the funds of a restricted Osage to him upon his application therefor, but the Indian has absolutely no control of this discretion, and the right given the Secretary by Congress but serves to empha-

size the fact that the funds are still subject to the trust and that the Indian has no independent control over them.

In the *Irving Trust Co.* case, *supra*, it was further held that the joint resolution of March 3, 1931, which this court said in *Helvering* v. *Hallock* displaced the construction in *May* v. *Heiner* and similar cases, did not operate retroactively. Prior to the decision in the *Irving Trust Co.* case this court had stated that by well settled rules of statutory construction, "a law is presumed, in the absence of clear expression to the contrary, to operate prospectively; that, if doubt exists as to the construction of a taxing statute, the doubt should be resolved in favor of the taxpayer." *Hassett* v. *Welch*, 303 U. S. 303, 82 L. ed. 858. The Second Circuit Court of Appeals again applied the rule in the more recent case of *Commissioner* v. *Singer's Estate*, 161 F. (2d) 15, holding that "the 1931 joint resolution of Congress and the amendment of 1932 to Sec. 811(c) specifically reaching transfers where the grantor has reserved a life estate have only prospective application."

Therefore, inasmuch as the trust provided for by Osage treaty and laws was created long before Oklahoma had an inheritance or estate tax law of any kind, it would be going to the extreme to say that the present Oklahoma inheritance tax law should have retroactive operation upon restricted Osage trust estates. *Nichols* v. *Coolidge*, 274 U. S. 531, 71 L. ed. 1184.

In *Globe Indemnity Co.* v. *Bruce*, 81 F. (2d) 143, 148, the Circuit Court of Appeals, Tenth Circuit defined an Osage headright as follows:

> "* * * The right to receive the trust funds and the mineral interests at the end of the trust period, and during that period to participate in the distribution of the bonuses and royalties arising from the mineral es-

tates and the interest on the trust funds, is an Osage headright."

The surplus funds, accumulated from income from the Osage tribal mineral interest, and securities purchased and held by the United States from such surplus funds partake of the same character as the mineral interest itself and the original trust funds. All continue to be held in trust until the termination of the trust period, and no provision of any law or regulation can be pointed to as giving to the restricted Osage Indian the absolute control of such property, or the right to pass to his devisee by will or his heir by descent the ultimate, absolute control and ownership of such property. As well said by the Circuit Court of Appeals, Fourth Circuit, in *Mullikin* v. *Magruder,* 149 F. (2d) 593, 597:

> "* * * The true test is whether under the terms of the conveyance full and complete dominion over the property by the transferee in a practical sense is established by the transferor's death."

Before leaving this point we call attention to the fact that by Section 3 of the Act of Congress of March 3, 1921 (41 Stat. L. 1249), hereinbefore quoted, Congress was careful to provide that the conferring of citizenship upon the Osages should not affect "their interest in tribal property or the control of the United States over such property as is now or may hereafter be provided by law." In other words, tribal property was to remain tribal property, subject to present and future Federal control. Certainly this renders unassailable the holding of the court in *Taylor* v. *Tayrien, supra,* that "an Osage Indian has no present property right in the properties now owned by the tribe."

IV.

The immunity from State taxation of the classes of property involved has never been withdrawn by Congress.

The various Acts of Congress relating to the Osage Indians and their property consistently have approached the question of State taxation from the angle of extending to the State of Oklahoma the right to tax, rather than from the angle of treating Osage property as subject to State taxation, but granting immunity in certain instances. This clearly appears in connection with the application of the Oklahoma gross production tax law and Section 5 of the Act of Congress approved March 3, 1921 (41 Stat. L. 1249).

In *Large Oil Co.* v. *Howard,* 63 Okl. 143, 163 Pac. 537, the Supreme Court of Oklahoma held that the Oklahoma gross production tax law applied to oil produced in Osage County, and was not objectionable because of the Federal instrumentality theory. However, this decision was reversed by this court by memorandum opinion on January 27, 1919 (*Large Oil Co.* v. *Howard,* 248 U. S. 549, 63 L. ed. 416). Rather promptly thereafter—on March 3, 1921—by Section 5 of the Act of Congress approved on that date, Congress provided "That the State of Oklahoma is authorized from and after the passage of this act to levy and collect a gross production tax upon all oil and gas produced in Osage County, Oklahoma," such tax to be "in lieu of all other state and county taxes levied upon the production of oil and gas as provided by the laws of Oklahoma." (41 Stat. L. 1249)

Thereafter the Oklahoma Legislature enacted a law providing for the levying of an excise tax of one-eighth of one cent per barrel on oil produced in Oklahoma, and the question of the validity of this law, as applied to oil pro-

duced in Osage County, came before both the Oklahoma Supreme Court (*Barnsdall Refineries* v. *Oklahoma Tax Commission*, 171 Okl. 145, 41 P. (2d) 918) and this court (*State of Oklahoma* v. *Barnsdall Refineries*, 296 U. S. 521, 80 L. ed. 366). Both courts held that the later Oklahoma statute was not within the Congressional consent to the levying of a gross production tax, and the opinion of this court definitely treated the 1921 Act of Congress as "removing the tax immunity," and as being a "waiver of tax immunity," to the extent and only to the extent provided by the act.

Just five weeks before the opinion below in this case the Supreme Court of Oklahoma handed down an opinion in *Texas Co.* v. *Oklahoma Tax Commission*, (18 Oklahoma Bar Journal, p. 1339; not yet officially reported) and by syllabus held:

> "A lessee producing oil from lands of restricted Kiowa and Apache Indians under departmental lease approved by and subject to supervision of the Secretary of the Interior of the United States, is engaged in the operation of a governmental instrumentality or agency and in the absence of permissive legislation by Congress, or appropriate Federal consent or waiver or withdrawal of immunity, the oil production or the oil as produced is not subject to the state excise tax of one-eighth of one cent per barrel, nor the state gross production tax of five per cent of the value of the oil produced."

The court in that case clearly adhered to the same view we are here presenting, as in the body of the opinion it is said:

> "And the United States Congress has acted on the theory that such immunity exists in the case of leases of this character unless waived. The Congress has adopted acts expressly waiving such immunity and granting to this state the authority to apply the gross

production tax as to certain designated Indian lands, the Osage Indian lands by Act in 1921 (41 Stat. at L. 1250), the Kaw Indian lands by Act in 1924 (43 Stat. at L. 176-177), and as to lands of the Five Civilized Tribes by Act in 1928 (43 Stat. at L. 496)."

At this point we again emphasize the distinction between the present case and the *Five Tribes* case (*Oklahoma Tax Commission* v. *United States*, 319 U. S. 598, 87 L. ed. 1612). In that case, by means of a footnote, it was pointed out that the 1933 Act of Congress relating to the Five Tribes provided:

"* * * That all minerals including oil and gas, produced from said land so acquired shall be subject to all State and Federal taxes."

Regarding this provision this court, in the case just cited, said:

"* * * Congress could not have intended that the minerals themselves should be subject to taxation, but that the proceeds of their sale, even further removed from the land itself, should be immune."

There is no such Act of Congress making the Osage mineral interest subject to any taxes whatever, other than the gross production tax, and this court has said that the Act of Congress authorizing that tax was a withdrawal of immunity to that extent, and that extent only. (*State of Oklahoma* v. *Barnsdall Refineries, supra.*) Any other view, we think, would be most illogical, as it is not to be assumed that Congress would engage in the wholly useless pastime of enacting a law giving the State permission to tax if there were no tax immunity to be waived. Furthermore, section 5 of the 1921 Act of Congress itself limited the scope of the permission granted to Oklahoma to tax by providing that the tax there authorized should be "in lieu

of all other State and county taxes levied upon the production of oil," etc.

It is clear from the opinion in *Mahnomen County* v. *United States*, 319 U. S. 474, 87 L. ed. 1527, that, wanting congressional consent, property held in trust by the United States for Indians is immune from state taxation. In that case the court said:

> "• • • The Clapp Amendment gives the consent of the United States to state taxation, thus removing the barrier to taxation found to exist in *United States* v. *Rickert*, 188 U. S. 432, 47 L. ed. 532, 23 S. Ct. 478, *supra;* but under *Choate* v. *Trapp*, the Indian who has gained a 'vested right' not to be taxed, must also consent."

In that case the court held the withdrawal of immunity effective solely because the Indian had consented thereto and there is no intimation in the opinion that the court disapproved the rule in the *Rickert* case.

We therefore respectfully urge that before the State is entitled to levy and collect an inheritance or estate tax in this case it must be able to point to express congressional consent thereto, and to this time no such consent has been given.

If we may be pardoned for repeating, we wish briefly again to emphasize the importance of the fact that, with the law apparently well settled by the *Rickert*, *Thurston County*, and *McCurdy* cases, *supra*, in all of which it was held that property held in trust by the United States for Indians is exempt from state taxation, Congress has upon three separate occasions—in 1921, 1929, and 1938—declared that the classes of Osage property here under consideration continue to be held in trust by the United States. We submi

that if there remains any life in the rule that re-enactment of a statute after judical construction thereof carries with it congressional approval of such construction, this would seem to be an entirely proper occasion for the application of the rule.

In this connection it is also significant that shortly after the decision of this court in *Large Oil Co.* v. *Howard, supra,* Congress withdrew existing immunity by passage of the 1921 Act permitting Oklahoma to levy and collect a gross production tax on oil and gas produced in Osage County, while on the other hand the Supreme Court of Oklahoma, in *Childers* v. *Pope,* 119 Okl. 300, 249 Pac. 726, (decided in 1926) held that property of a restricted Osage Indian held in trust by the United States was not includable in his estate for inheritance tax purposes, and Congress has never since that decision acted to withdraw the immunity there found to exist, but twice since that time has extended the trust period as to all classes of property in controversy in this case. It does seem that in the twenty-one years that have elapsed since *Childers* v. *Pope,* if Congress had been willing that Oklahoma collect an inheritance tax upon restricted Osage estates it would have said so, as it did with reference to the collection of a gross production tax.

Conclusion.

We urge that each of the reasons given above is sufficient to require a reversal of the judgment below. We are not confronted in this case with the question of the extent of congressional power to permit the State of Oklahoma to levy the tax in controversy, though as we have before intimated, we would seriously question such power to liquidate *pro tanto* the trust estate. The indisputable fact remains

that Congress has never at any time given its consent to the levying of the tax now sought to be exacted, and at least until such consent is given we believe it must be held that all of the classes of Osage property above discussed are immune from all forms of state taxation as long as *United States* v. *Rickert* and similar cases remain the law.

Respectfully submitted,

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No. 489

In the Supreme Court of the United States

October Term 1947.

MARY MORTON WEST, OSAGE ALLOTTEE NO. 192,
Appellant,

vs.

OKLAHOMA TAX COMMISSION.

Appeal from the Supreme Court of the State of Oklahoma.

REPLY BRIEF of APPELLANT.

FRANK T. McCOY,
JOHN T. CRAIG,
JOHN R. PEARSON,
FRANK MAHAN,
Counsel for Appellant.

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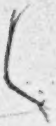

IN THE SUPREME COURT OF THE UNITED STATES.

October Term 1947.

No. 489

MARY MORTON WEST, OSAGE ALLOTTEE NO. 192,
Appellant,

vs.

OKLAHOMA TAX COMMISSION.

REPLY BRIEF *of* APPELLANT.

As briefly as possible we shall reply to the various contentions made in the answer brief of the appellee.

It is not clear to us just what opposing counsel mean in suggesting that "the right of Oklahoma to impose a tax on all of the properties included in the assessment, is now before the court unless the concession of appellant at page 14 of her brief be considered as a withdrawal of the protest as to *all* real estate included in the assessment." If by this is meant that we are conceding the taxability of the homestead, we make no such concession. The Oklahoma Tax Commission held the homestead exempt (R. 16), and the Supreme Court of Oklahoma pointed out in its opinion (R. 33) that "It is conceded the allotted homestead is nontaxable and the Commission made no order taxing it under the above statute." Therefore, the question of the taxability of the homestead is not now before this court.

We believe we have fully distinguished the *Five Tribes* case in our original brief, and in answer to appellee's analysis of that case we merely point out that the rule is well settled that:

> "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."
>
> —*Rathbun* v. *United States,* 295 U. S. 602, 79 L. ed. 1611, 1618.

In our judgment, neither the fact that the Osage Indian is a citizen of the United States, as emphasized in appellee's brief, nor the attempted distinction between an estate tax and an ad valorem tax answers the contentions made in our original brief. As pointed out at page 32 of our brief, by Section 3 of the Act of Congress of March 3, 1921, Congress provided that the conferring of citizenship upon the Osages did not affect their interest in tribal property or the control of the United States over such property. Nor did the citizenship of the Indian in *United States* v. *Board of Commissioners,* 145 F. (2d) 329, cause the Tenth Circuit Court of Appeals to depart from the rule that property held in trust by the United States for an Indian or a tribe is not subject to state taxation.

So far as the nature of the tax is concerned, whether ad valorem or excise, the principle is the same if the power to

levy the tax is wanting. This is likewise true as to the degree of interference with the federal government in the administration of the trust estate. Both in this case below and in the *Five Tribes* case the homestead is treated as exempt from the estate tax because it is exempt by statute from ad valorem tax. Surely, a constitutional exemption, even though only by implication, would be as effective to exempt the property under consideration from estate tax as from an ad valorem tax. Indeed, we urge that the constitutional exemption should have greater force and dignity than a mere statutory exemption. In this connection it should be kept in mind that it has been stipulated in this case that the classes of property under consideration have never been subjected to taxation.

Counsel argue the triviality of the burden cast upon the federal government by the proposed tax, but if the principle for which we contend applies, the extent of the interference is immaterial.

In *Johnson* v. *Maryland*, 254 U. S. 51, 56, 65 L. ed. 126, 128, it was said:

> "* * * With regard to taxation, no matter how reasonable, or how universal and undiscriminating, the state's inability to interfere has been regarded as established since *M'Culloch* v. *Maryland*, 4 Wheat. 316, 4 L. ed. 579. The decision in that case was not put upon any consideration of degree, but upon the entire absence of power on the part of the states to touch, in that way, at least, the instrumentalities of the United States (4 Wheat. 429, 430), and that is the law today."

And in *Indian Motorcycle Co.* v. *United States*, 283 U. S. 570, 575, 75 L. ed. 1277, 1281, in discussing the principle this court stated that:

> "* * * Where the principle applies it is not affect-

ed by the amount of the particular tax or the extent of the resulting interference, but is absolute."

Next, under the heading that "The Restricted Osages Have a Restricted Fee Simple Title," counsel discuss at some length the title of the Osage Indian, including the title to the land allotted to him. The question of title to the land may be waived aside as in no wise involved in this appeal. It is conceded that all of the land, except the homestead, is includable for estate tax purposes because specifically made subject to taxation by Congress. But the title to the mineral interest and to funds arising therefrom is altogether a different question. To us it seems an absurdity to argue that title to the mineral interest is in the individual Indian, in view of the deed given by the Cherokees to the United States, the subsequent severance of the surface and the minerals, and the express provisions of the various Acts of Congress reserved the minerals for the use of the tribe and extending the period for which the same are to be held in trust by the United States for the tribe.

It is stated in appellee's brief that we insist that under Section 5 of the Allotment Act it will be necessary, at the expiration of the trust period, for the United States to issue deeds to the mineral interest. We know of nothing in our brief that may be so construed, but if there is, it was not so intended, as such a thought never occurred to us. Nor can we agree with opposing counsel that "at no time will an original allottee, or his successors in title, ever own all of the minerals under any particular allotment." Such view, in our judgment, finds no support in any Act of Congress. Section 2 of the Allotment Act (34 Stat. 539) provides that:

"* * * the oil, gas, coal and other minerals upon

said allotted lands shall become the property of the individual owner of said land at the expiration of said twenty-five years, unless otherwise provided for by Act of Congress."

There is no provision anywhere in any of the Osage Acts indicating that the severance was for all time to come, as contended by counsel, and the meaning of the above provision of Section 2 is clearly to the contrary.

While on this question of title we desire to point out the strange and utter inconsistencies in the Oklahoma decisions on the question, but in so doing we do not wish to be understood as intending any disrespect whatever toward the Supreme Court of Oklahoma. At page 13 of our original brief we cited and quoted from the case of *McKnight* v. *Panther,* 190 Okl. 127, 120 P. (2d) 973. In that case, in an action by a private citizen, creditor of an Osage Indian, it was held plainly and without qualification that title to funds accruing from the Osage mineral interest "still remained in the Government until such time as the check was presented for payment and properly cleared." This holding is altogether irreconcilable with the holding of the lower court in the present case, yet we have not the slightest doubt that were the question again presented to that court in another case involving the claim of a private citizen the court would adhere to its position in the *McKnight* case.

It is, we believe, wholly illogical to apply one rule in the case of a private citizen, seeking to collect a just debt, and a different rule where the state is seeking to collect revenue. Both this court (*Hecht* v. *Malley,* 265 U. S. 144, 68 L. ed. 949) and the Supreme Court of Oklahoma (*Rollins* v. *Heuman,* 171 Okl. 435, 43 P. (2d) 147) follow the rule that statutes authorizing the levy of taxes are to be con-

strued most strongly against the government and in the taxpayer's favor, and it would seem that the rule would be the same as to the application of taxing statutes.

We insist that it does not answer the rule laid down in the *Rickert* case and similar cases to argue that the Osage Indian has the beneficial interest in the classes of property under consideration. That was true in the *Rickert* case, and it has been true in every other case in which this court and other federal courts have held that property held in trust for Indians by the United States is exempt from state taxation.

In this connection we call attention to the fact that the brief of appellee is in error in stating that in *United States* v. *Thurston County,* 143 Fed. 287, the "assessment was on lands" of the Indians. The effort of the taxing officials in that case was to tax money belonging to the Indians, on deposit in bank, the proceeds of the sale of lands.

Appellee's brief is also in error in asserting that in quoting from *Adams* v. *Osage Tribe,* 59 F. (2d) 653, we merely quoted the contention made by the United States. We also quoted the portion of the opinion which the court pointed out that the District Court had held that title to the minerals "is held in trust by the United States for the tribe's use and benefit." Surely we are entitled to assume that by affirmance of the judgment the Circuit Court of Appeals approved this holding of the lower court. We fail to see how any other conclusion could be logical or proper. The deed from the Cherokees clearly put the title in the United States, and so far as the mineral interest is concerned it still rests there, and will continue to rest there until the end of the trust period, at which time Congress has provided that the oil, gas, coal and other minerals shall

become the property of the individual owner of the land. Under such circumstances can it be said, by any process of logical reasoning, that at the time Mary Morton West died she was the owner of that of which her heirs or their successors in title would eventually become the owners at some uncertain and indefinite time in the future?

Counsel make the suggestion that more than seventy-five per cent of the oil from Osage lands came from surplus lands and less than twenty-five per cent from homesteads. We do not know what authority counsel have for this statement, as there is no such evidence in the record, but as we view the matter, by reason of the severance of surface and mineral rights, it makes not the slightest difference one way or the other whether all of the oil comes from under homestead lands or all from under surplus lands.

At one point in appellee's brief reference is made to "funds held in trust by the United States and which funds were and are credited to the individual Osage's account." The latter part of the statement is contrary to the stipulation of the parties, which provided (R. 13) that "Osage funds are paid to the United States Treasury and held by it undesignated as to members of tribe but simply as the Osage Tribal Trust Fund."

In discussing the *Rickert* case as applied to the Osage title counsel say that "title was held in trust by the United States when the *Rickert* case arose, but as stated in the opinion title passed when the provision of the Allotment Act has been carried out by the execution and approval of the deeds." We assume by opinion counsel mean the opinion of the lower court in the present case, but title to what passed by the execution and approval of the deeds? Certainly not title to the mineral interest, unless the provisions

of the Allotment Act that the minerals shall become the absolute property of the owner of the surface at the end of the trust period and of other Osage Acts extending the trust period are to be altogether ignored. To contend that title to all of the classes of property in controversy is not held in trust by the United States is to fly directly in the face of positive and repeated Acts of Congress.

Under their Proposition 2, counsel argue that the right to collect the tax is fully established by the *Five Tribes* case and by *Landman* v. *Commissioner*, 123 F. (2d) 787. But neither of those cases involved Osage estates, and we believe we have sufficiently pointed out the difference between the character of the tenure of Five Tribes property and that of Osage property.

Counsel have gone outside of the record in including in their brief certain tabulations showing the various amounts to the credit of individual Indians of different tribes and of the tribes themselves. This, we submit, has no bearing whatever upon the questions involved in this appeal. However, for whatever it may be worth, we point to the *Landman* case as a glaring example of the difference between the rights of the Osage in tribal properties and the rights of a member of the Five Tribes in his individually owned property. The opinion in the *Landman* case shows that over a period of twenty-one years the deceased had drawn from her individual funds a total of $444,811.90, or more than $21,000 each year. The Osage Indian had no such almost unlimited right, and upon his death his heirs have no such unlimited right. We insist that all the restricted Osage Indian has and all he passes to his heirs at his death is the right to a limited income for life, without authority or control over the corpus of the property from which the income arises.

Counsel state that in *Five Civilized Tribes* v. *Commissioner*, 295 U. S. 418, 79 L. ed. 1517, this court disapproved of the holding in the *Blackbird* case, cited in our brief. Such disapproval was expressed, but merely by way of *dictum*, as the *Five Civilized Tribes* case did not, of course, involve an Osage question. The *Blackbird* case is still the law so far as federal income taxes on restricted Osages is concerned. (*Rathbun* v. *United States, supra.*)

Appellee admits that the allottee does not have "the right to lease and sell," and this lack of right, we believe, is a vital point in this case. Certainly, neither the restricted Osage nor his heir, if of any Indian blood, has any right whatever to sell either the mineral interest, future accruals to the headright or accumulated accruals in the Treasury of the United States, or bonds or other securities in which such funds have been invested. As pointed out by a quotation at page 32 of our original brief, the true test in a case of this kind is whether full and complete dominion over the property in a practical sense is fixed in the heir or transferee by the death of the decedent.

Under appellee's Proposition 3 the question is asked, If nothing passed upon the death of the decedent, why was the estate probated? Something did pass—the right to income, the same right the decedent had, which "was obliterated" by the event of his death so far as he was concerned, and which will be obliterated by the death of appellant, so far as she is concerned, if she dies prior to the expiration of the trust period as presently extended or may hereafter be further extended. We ask a counter question—Does appellee contend that upon the death of the decedent appellant came into full control of the corpus of the property held in trust by the United States? If she did, then so far as this

particular question is concerned, that corpus is includable in the gross estate. If she did not, then appellee has wholly failed to meet our contention on this point.

Certainly it must be conceded that the right to income is a valuable right, but estate or inheritance tax laws are not designed to act upon such a right. Income tax laws serve that purpose. Let us suppose that in the present case Mary Morton West had died within one year from the date she inherited the right to the income from this Osage property. The value of the right which she inherited is measured solely by the total income received by her before her death. But, it will be objected, she would pass the estate upon her death to her heir. But suppose that heir then died within one year. The illustration but serves to demonstrate the truth of the contention that until the end of the trust period the restricted Osage Indian does not have that degree of control over the corpus of the property which would justify the inclusion of it in his gross estate for estate tax purposes.

Certainly probate was necessary. It was necessary for a determination of heirs, persons who would be entitled to receive, not only the income from the classes of property which we contend are not properly includable in the gross estate for estate tax purposes, but also the corpus of the classes of property which we conceded are properly includable, such as purchased and inherited land, stipulated as subject to ad valorem taxation.

Appellee presents what to our minds is the rather astonishing argument that notwithstanding the severance of the surface rights from the mineral rights, "the Osages have always paid indirectly a tax on the minerals underlying their surplus lands because as the owners of the surface they paid an ad valorem tax thereon." This, in effect

amounts to the argument that the State of Oklahoma is taxing the individual Osage upon property which he does not own, for if language means anything at all, under the provisions of the seventh paragraph of Section 2 of the Allotment Act the owner of the land does not become the owner of the minerals until the end of the trust period. Clearly Oklahoma would not have the constitutional power to do that, but we submit that the application of the Oklahoma estate or inheritance tax law to the classes of property in question in the present case is just such an attempt.

Opposing counsel destroy their entire argument under their Proposition 3 by their reliance upon the case of *Gypsy Oil Co.* v. *Oklahoma Tax Commission,* 6 F. Supp. 6, and their contention that the case is "authority supporting the proposition that Congress does not consider that a diminishing of the properties of the Osages through a nondiscriminatory tax prevents the carrying out of any provision of the law requiring a delivery of the properties to the Osages intact at the expiration of the trust period." In that case the Gypsy Oil Company sought to enjoin the enforcement of an act of the Oklahoma Legislature imposing a tax of ⅛th of a cent per barrel upon oil produced under leases made with the Osage Tribe of Indians. The opinion was handed down on February 19, 1934. By a strange coincidence, on the very same day, in the case of *Barnsdall Refineries* v. *Oklahoma Tax Commission,* 171 Okl. 145, 41 P. (2d) 918, (cited and discussed at page 34 of our original brief) in the selfsame kind of suit brought for the same purpose, the Supreme Court of Oklahoma held invalid, as applied to oil produced under Osage leases, the Oklahoma law there under attack as not within the congressional withdrawal of immunity by the gross production tax law. And as pointed out in our original brief, this court (296 U. S. 521, 80 L. ed. 366)

affirmed the judgment of the Oklahoma Supreme Court, and treated the gross production tax law enacted by Congress (41 Stat. L. 1249; Section 5 of Act approved March 3, 1921) as a withdrawal of immunity to that extent and that extent only.

The argument that no immunity exists unless expressly granted by Congress is wholly without force in the face of congressional consent to tax in certain instances and this court's confining of the withdrawal of immunity strictly within the limits of the consent granted.

Under Proposition 5 opposing counsel again urge the remote and inconsequential effect of the proposed tax. We believe we already have answered this contention. If the principle for which we contend applies, the rule is absolute and the extent of the interference immaterial. (*Johnson* v. *Maryland, supra; Indian Motorcycle Co.* v. *United States, supra.*) We have fully discussed the matter of interference with the government's duty to the Osages (see pages 20 to 26 of our original brief), and do not believe we should further burden the court on this point.

Before closing this brief we believe we can demonstrate that the appellee is far less convinced of the soundness of its position than its argument would indicate. On August 22, 1944, even after the final order of the Commission assessing the tax (R. 15), there was introduced in the Senate of the United States at the request of the appellee, bill No. S. 2102, entitled "A bill relating to transfer, inheritance, and estate taxes on the transfer of certain properties of tribal and individual Osage Indians of Oklahoma," and providing as follows:

> *"Be it enacted by the Senate and House of Representatives of the United States of America in Congress*

assembled, That the tax exemptions contained in existing laws, treaties, or trust deeds or other instruments applying to the properties of Osage Indians shall not be construed to apply to transfer, inheritance, or estate taxes on the transfer of lands and personal property of Osage Indians, including trust funds held by the United States Government for the benefit of the Osage Tribe of Indians and individual Osage Indians, and including the value of what is commonly designated 'Osage Headright Interests,' but said properties shall, upon the death of the owner thereof, be subject to the Oklahoma transfer, inheritance, or estate taxes in the same manner and to the same extent as the laws of Oklahoma apply to the trust funds and other properties belonging to restricted members of the Five Civilized Tribes; *Provided, however,* That the homestead allotments of Osage Indians not having a certificate of competency shall be exempt from such transfer, inheritance, and estate taxes, while title remains in the original allottee of one-half or more of Osage Indian blood and in his allotted heirs or devisees of one-half or more of Osage Indian blood, until January 1, 1984; *And provided further,* That such tax-exempt land of the allottee, heir, or devisee shall not, at any time, exceed one hundred and sixty acres of land.

"Sec. 2. The provisions of this Act shall apply to transfers heretofore made wherein the estate has not been finally closed and a final distribution made by proper probate procedure, as well as to transfers occurring after the enactment thereof."

This bill was not enacted into law, and died with the Seventy-eighth Congress. While it may be true that failure to pass the bill should not be taken as conclusive evidence that Congress simply was not willing to withdraw the immunity conceded by the bill to be present under existing laws, treaties, etc., that is at least the implication, and cer-

tainly the effort to have the bill enacted is conclusive evidence that appellee and its counsel, almost from the beginning of this proceeding, have considered unsound their position as to the applicability of the Oklahoma estate or inheritance tax statutes to the classes of property involved in this appeal.

While there is a dearth of authority upon the question, we feel that we are entitled to call attention to the abortive attempt to have above bill enacted into law, though not shown by the record herein, for the reason that the court may take judicial notice of such attempt. *Gebelein* v. *Milbourne,* 12 F. Supp. 105, 119.

Conclusion.

From our discussion in this and our original brief it will be seen that two fundamental propositions inhere in our position: (*1*) Under the doctrine of the *Rickert* and other similar and later cases the classes of property in controversy must be held exempt from all forms of state taxation, and (*2*) because of the character of the tenure of such classes of property by the restricted Osage Indian, the Oklahoma statute as applied below impinges upon the rights of the Indian as vouchsafed to him by the Fourteenth Amendment to the Constitution of the United States.

We have no desire to discuss further point (2), other than to say that in our judgment appellee's brief does not adequately answer our contention.

As to the doctrine of the *Rickert* case, we urge that in view of the repeated references to that case as authority it will hardly suffice to attempt to waive it aside as outmoded and obsolete. The late case (1944) of *United States* v. *Board of Commissioners,* 145 F. (2d) 329, is, we be-

lieve, of great importance on this point. There it was the Indian's own money which went to purchase the land sought to be taxed, but title having been taken in the United States in trust, it was held that the property was immune from taxation. We call attention to the fact that the Circuit Judge (Tenth C. C. A.) who wrote a dissenting opinion in the *Five Tribes* case substantially in agreement with the later decision of this court, concurred in the opinion in *United States* v. *Board of Commissioners,* thereby approving the distinction therein made between the *Rickert* case and the *Five Tribes* case.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 489

MARY MORTON WEST, Osage Allottee No. 192,
Appellant,

VERSUS

OKLAHOMA TAX COMMISSION,
Appellee.

Appeal from the Supreme Court of the State of Oklahoma

ANSWER BRIEF of Appellee

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 489

MARY MORTON WEST, Osage Allottee No. 192,
Appellant,

VERSUS

OKLAHOMA TAX COMMISSION,
Appellee.

Appeal from the Supreme Court of the State of Oklahoma

ANSWER BRIEF

STATEMENT OF THE CASE

The appellee does not question the jurisdiction of this Court.

The parties entered into a stipulation covering the facts (R. 12-15) which we summarize as follows:

Charles West, Jr., was a restricted, full-blood, adult unallotted Osage Indian. He died intestate September 2, 1940, while domiciled in and a resident in good faith of the State of Oklahoma where he had lived all of his life. No certificate of competency had ever been issued to him. He left surviving his mother, Mary Morton West, who is a full-blood, restricted Osage Indian and to whom the entire estate passed as the sole heir at law, except for an amount paid (and transferred) to the deceased's widow.

All of the property of Charles West, Jr., is restricted property in the possession and under control of the United States acting through the Secretary of the Interior.

The United States retained in a separate account sufficient funds to pay the inheritance taxes assessed and that Osage funds are paid to the United States Treasury and held by it undesignated as to members of the Tribe and simply as Osage Tribal Trust Fund. (The interest of the individual Osage is, of course, fixed by whatever interest he may own in a headright or headrights).

No penalty or interest will be charged or collected for any time prior to thirty days subsequent to the recording of the mandate after final decision herein.

At the death of Charles West, Jr., he owned:

(a)	1 and 919/2520ths. Osage Indian mineral headright. Value	$10,235.12
(b)	Trust funds in U. S. Treasury. Value	4,745.52
	Interest that had accrued thereto	398.90
(c)	Surplus funds in U. S. Treasury. Value	29,046.27
(d)	United States bonds. Value	70,949.31

(e)	Building and Loan Stock	1,485.06
(f)	Inherited real estate, other than homestead. Value (This included an interest in some 25 tracts of land. See R. 4B)	12,226.10
(g)	3/28th interest in Masonic Mortgage. Value	1,071.43
(h)	Purchased real estate. Value	5,000.00
(i)	Homestead. Value	1,833.33
(j)	Household furniture. Value	736.00
	Total Value	$137,727.04

It was stipulated that properties of Classes a, b, c, d, e, and g were never subjected to taxes; that properties of Classes f and h were. (The parties were referring to ad valorem taxes). The source of the properties is also stipulated.

The Oklahoma Tax Commission valued the estate at $132,727.04 (this was the value after allowing a homestead exemption of $5,000.00), a further deduction of $21,507.86, representing the basic exemption of $15,000.00, and expense of last sickness, expense of administration, etc., totalling $6,507.86, and subjected to tax $111,219.18. The tax imposed was $4,373.15, together with a penalty in the amount of $940.20, or a total of $5,313.35.

The only funds coming into the hands of the administrator was $5,606.50 released to him to pay claims and the expense of administration.

The estate was retained in trust by the United States after administration to the same extent as it was before administration.

It was further stipulated that the largest payment on a headright was $12,000.00 in 1924, the smallest was $598.00 in 1933 and $945.00 in 1940.

In the appellant's brief, reference is frequently made to the following quoted portion of the stipulation:

> "A mineral headright is the undivided 1/2229th part of all minerals in Osage County, Okla., formerly the Osage Nation, title to which minerals has been, is and will be held in trust by the United States until 1984 or such further time as Congress may provide [*Globe Indemnity Co.* v. *Bruce*, 81 Fed.(2d) 143, l. c. 147-150], and had never been subjected to taxation."

It is argued by appellant that the Oklahoma Tax Commission in effect, stipulated that the beneficial title to the properties of the Osages was in the United States. This portion of the stipulation is limited to and by whatever the Court in fact held in the *Globe Indemnity case*, in which case the court held,

> "* * * that the beneficial title to the funds and moneys vested in the individual members of the tribe,"

and

> "* * * that a present equitable interest in the lands, moneys and mineral interest vested in the members of the tribe and on the death of a member descends to his heirs."

The quoted language follows the statement that,

> "* * * the United States took the legal title to the funds and money in trust,"

and which language when construed in connection with the language that follows should be construed to mean that the United States took and held only the naked legal title.

The appellant protested the assessment of estate taxes in its entirety (R. 9-11). The Oklahoma Tax Commission sustained the assessment as made and the Supreme Court of Oklahoma affirmed the Tax Commission. Therefore, the right of Oklahoma to impose a tax on all of the properties included in the assessment, is now before the Court unless the concession of appellant at Page 14 of her brief be considered as a withdrawal of the protest as to all real estate included in the assessment. As hereinbefore stated, $26,507.86 was allowed as deductions and a part thereof was a homestead deduction of $5,000.00

The appellee asserts that the case of *Oklahoma Tax Commission* v. *United States*, 319 U. S. 59, 63 Sup. Ct. 1279 (hereinafter referred to as the *Five Tribes case*), adjudicates all issues raised and presented by appellant favorably to the appellee. In order to show that the *Five Tribes case* is decisive here, we analyze that case.

The deceased full-blood Indians (Creeks and Seminoles) were restricted, and this was true of most of their heirs.

The property comprising the estates was of the same general class and character as the property here involved; land exempt from direct taxes; land not exempt from direct taxes; restricted cash and securities held by the Secretary of the Interior, and miscellaneous property and insurance.

In that case as here, the Indians were citizens of Oklahoma and the United States and the estates consisted of properties of considerable value.

Oklahoma intended to tax the estates of all Indians and her past actions were consistent with such avowed intent.

Restriction "without more, is not the equivalent of a congressional tax immunity for the cash and securities" (this would apply to properties purchased from surplus restricted cash).

The case of *United States* v. *Rickert*, 188 U. S. 432, and cases preceding that case, are to be distinguished because (1) the Indians were not citizens when those cases arose, (2) it was necessary for the United States to protect the Indians from violence, (3) the Indians retained their tribal form of government, (4) as in the *Rickert case*, title was held in trust for the Indians when the case arose (but, consistent with the *Rickert case*, title was in the Osages after the allotment deeds were executed and approved), and (5) all of which facts led to the Federal government invoking the federal instrumentality rule and thereunder denying to States the right to tax the Indians. "The underlying principles on which (former) decisions are based do not fit the situation of the Oklahoma Indians" (not limiting the term "Oklahoma Indians" to members of the Five Civilized Tribes, but including all Oklahoma Indians), which resulted from (1) citizenship being bestowed on the Indians, (2) the disappearance of tribal autonomy and (3)

the fact that the United States does not hold the beneficial title to the properties of the Indians.

The purpose of Congressional Acts extending the restricted period was to protect the Indians as individuals from those who might take advantage of him and to make certain of his lands free from ad valorem taxes. The purpose was not to expand tax exemptions, and did not by implication prohibit estate taxes.

"Congress could not have intended that the minerals themselves should be subject to taxation, but that the proceeds of their sale, even further removed from the land itself, should be immune." Tax exemptions are not granted by implications. (Congress permitted the imposition of a gross production tax on both Osage and Five Civilized Tribes production). Minerals, as such, prior to production, are not and have never been subject to taxation in Oklahoma).

"If exemption exists it must derive plainly from agreements with the Indians" and "if Congress intends to prevent the State of Oklahoma from levying a general nondiscriminatory estate tax applying alike to all its citizens, it should say so in plain words. Such a conclusion cannot rest on dubious inferences."

While acts of Congress dealing with the Indians will be construed in accord with the generous and protective spirit always shown them by the United States, it cannot be assumed that Congress intended "to aid the Indians by

permanently granting them immunities from taxes which they are as able as other citizens to pay." That:

> "Congress cannot have intended to impose federal income and inheritance taxes on the Indians and at the same time exempt them by implication from similar state taxes."

Congress has passed laws under which Indians have become full-fledged citizens of Oklahoma.

> "Oklahoma supplies for them and their children schools, roads, courts, police protection and all the benefits of an ordered society. Citizens of Oklahoma must pay for these benefits. If some pay less, others must pay more."

Since Oklahoma became a State the loss to it from tax immunities granted the Indians has totaled more than $125,000,000.00 It cannot be implied that Congress "intended the burden to be borne so heavily by one state." (It was pointed out in a foot-note that the Osages are reported to own property valued at $31,968,000.)

> "But there is a complete absence of any evidence of congressional belief that these exemptions are required on equitable grounds, no matter on which sovereign the burden falls. Here is a tax based solely on ability to pay, 'Only the same duties are exacted as from our own citizens. The burden must rest somewhere. Revenue is indispensable to meet the public necessities. It is unreasonable that this small portion of it shall rest upon these Indians.' *The Cherokee Tobacco, supra,* 11 Wall., Page 621, 20 L.ed. 227."

Tax favoritism has been swept aside by the courts in many instances by (1) permitting a state to impose an income tax upon government employees; (2) permitting

the federal government to tax income of state employees; (3) permitting judges to be taxed as other citizens and by "repudiating former decisions seriously limiting state and federal power to tax. The trend of these cases should not now be reversed."

Cash, securities and personal property were not exempt from an Oklahoma estate tax.

All lands not exempt from direct taxes are subject to the Oklahoma estate tax, but the homestead is exempt.

The appellant contends that the *Five Civilized Tribes case* is not decisive here for the reason title does not rest in the Osages but did rest in the members of the Five Civilized Tribes.

She asserts that the United States holds title to all of the restricted properties of the Osages and that a restricted Osage Indian, therefore, does not have such an interest in his restricted properties, nor does his heir or devisee have such an interest therein, as to permit the imposition of an estate tax.

The appellee counters with the following general propositions:

PROPOSITION No. 1

The title of a restricted Osage in his properties is for all practical purposes the same as that of a restricted member of the Five Civilized Tribes.

The tax here sought to be imposed (an estate tax) is an excise tax. The tax is imposed upon the shifting of economic benefits and the privilege of transmitting or

receiving such benefits. It is not levied on the property of which an estate is composed.

In *McGannon* v. *State*, 33 Okla. 145, 124 Pac. 1063, at Page 150 of the Oklahoma Reports, the court stated:

> "(1) An inheritance tax is not one on property, but on the succession. * * *"

In *In re: Whitson*, 88 Okla. 197, 212 Pac. 752, the surviving husband, W. Whitson, made the contention that under the statutory law of Oklahoma one-third of the estate of his wife was not subject to an inheritance tax, for the reason his wife under the law could not have willed more than two-thirds of her estate to others. He asserted that, "one-third of the estate passed to the husband by operation of law, and (was) therefore not subject to inheritance tax."

In answering this contention the court at Page 199 of the Oklahoma Report quotes with approval from a case from another jurisdiction as follows:

> "* * * And if a condition be that the kindred or legatees shall pay a bonus this is not a tax imposed on their property or anybody else. * * *"

The court held that the husband took under his wife's will and all of the estate was subject to tax.

In 28 Amer. Jur., P. 12, Sec. 10, the author states that an estate tax,

> "* * * is an excise tax imposed on the privilege of transmitting or receiving property upon the death of the owner."

The author, at Page 17 of the same volume points out that the United States can impose an estate or inheritance tax although the United States does not have power to re-

gulate the devolution of estates, and, it, therefore, imposes such a tax notwithstanding the estate does not pass under any law of the United States.

In the case of *Landman* v. *Commissioner of Internal Revenue* (C. C. A. 10th), 123 Fed.(2d) 787, *certiorari* denied, 315 U. S. 810, the Superintendent of the Five Civilized Tribes made the same contention in connection with the imposing of federal estate tax on the estate of a restricted full-blood Creek Indian as is here made by appellant. The Circuit Court rejected the contention and held the estate taxable.

The substantial facts in the *Landman case* were these. Jeanetta Tiger, a full-blood, restricted Creek Indian, died seized of a restricted allotment, having an agreed value of $3,000.00, Liberty Bonds having an agreed value of $227,243.41, and cash with the Superintendent of the Five Civilized Tribes in the amount of $4,754.89. "The Liberty Bonds represented the invested proceeds derived from the production of oil and gas from the allotment, all of which were restricted funds held by the Secretary of the Interior under the direct supervision of the Superintendent of the Five Civilized Tribes."

The court points out that,

> "Title to whatever articles were purchased for the benefit of the decedent was retained in the United States. The decedent had no control whatsoever over the restricted funds, except the right to the exclusive benefit thereof, or so much as in the judgment of the Superintendent was required for the maintenance of herself and her family. * * *"

That,

> "She had the exclusive right to the possession of the allotment and retained the same as her residence. Upon the death of the decedent, the allotment and funds passed to her heirs, consisting of a husband, seven living children and three grandchildren, according to the laws of descent and distribution of Oklahoma. See *Caesar* v. *Burgess* (C.C.A. 10th), 103 Fed.(2d) 503. The heirs are likewise restricted Indians and the estate passed to the heirs by the simple expedient of transferring the account of the decedent with the United States Treasury to the restricted heirs according to their respective shares, which was effected by a book-keeping transaction in the office of the Superintendent of the Five Civilized Tribes."

Under these facts, it must be admitted that the full-blood Creek Indian woman was as highly restricted in connection with the use of her properties as was possible, and that such was true of her heirs. This situation is what caused the Superintendent to urge that none of the interests of the Indians was more than a "hollow interest in the estate," and that this interest did not amount to an estate within the meaning of the federal estate act. The superintendent further contended that since the properties involved were exempt from all form of taxes, the estate was exempt from an estate tax. The contentions so made by the Superintendent were answered as follows:

> "We can find nothing in the nature of the control exercised by the Superintendent as the guardian of the Indian ward which would justify the application of the instrumentality doctrine. The power and the control of the Superintendent over the estate of the Indian ward was no more than the mere exercise of a governmental function for the benefit of a private citizen.

No public purpose or end is sought to be effected, except insofar as it becomes the duty of the government to fulfill its historical obligations to a class of its citizens, recognized as a dependent people. This is especially true when the so-called instrumentality doctrine is considered in the light of the recent decisions which bear upon this question" (Citing cases).

At Page 790 the court points out that an estate tax s not upon the property of the estate, but is an excise tax on the shifting of economic benefits from the dead to the iving. We quote this portion of the opinion, omitting citaions:

"When considered in this light, it is plain that the exemption from taxation accorded the Creek Indians, such as the decedent, cannot be extended to the imposition of a tax on the 'transfer of the net estate of every decedent dying after the enactment of this act.' This is made more abundantly clear by the decisions which have defined the nature and character of the estate tax as an excise tax upon the shifting of economic burdens and benefits, or on the privilege of transferring property of decedent at death (Citing cases). 'An estate tax is not levied upon the property of which an estate is composed.' *United States Trust Co.* v. *Helvering*, 307 U. S. 57, 59 S. Ct. 692, 693, 83 L.ed. 1104.

"There is nothing in the treaties or the acts of Congress, confirmatory thereof, which prohibits the imposition of a tax on the right to inherit or succeed to non-taxable property rights. Here the tax falls upon the transfer or shifting of the economic benefits and not upon the property of which the estate is composed. It therefore is not within any constitutional immunity growing out of a contract or agreement between the United States and the Creek Indian, as characterized by the Act of April 26, 1906."

The *Landman case* was cited in the *Five Civilized Tribes case,* with approval. We quote that portion of the opinion from Page 608 of the U. S. Report:

> "* * * A federal court has held, in a well reasoned decision defended before us by the Solicitor General of the United States, who is not a party to this action, that an Indian's estate is subject to the federal estate tax. *Landman* v. *Commissioner* (C.C.A. 10th), 123 Fed. (2d) 787. Congress cannot have intended to impose federal income and inheritance taxes on the Indians and at the same time exempt them from similar state taxes."

The United States imposes a federal estate tax on the estates of restricted Osages. This fact is hereinafter discussed at some length.

The Restricted Osages Have a Restricted Fee Simple Title

This Court has held that a restricted Indian, though title to his land be held in trust by the United States, has a fee simple title in his allotment. We cite and quote from cases where this Court so held.

In *United States* v. *Paine Lumber Co.,* 206 U. S. 467, 27 S. Ct. 697, this Court in speaking of the title of a restricted Indian said:

> " * * * The restraint upon alienation must not be exaggerated. It does not of itself debase the right below a fee simple. *Libby* v. *Clark,* 118 U. S. 250, 30 L.ed. 133, 6 Sup. Ct. Rep. 1045. The title is held by the United States, it is true, but it is held 'in trust for individuals and their heirs to whom the same was allotted.' * * * The land is not the land of the United States, and the time when cut did not become the property of the United States. * * * "

In that case a treaty with the Stockbridge and Munsee Indians provided for allotment by the council of the tribe, under the direction of the superintendent, with full right in the allottee to take immediate possession, but the United States was to hold title in trust until a patent was issued to the individual allottees. In the instant case, as hereinafter fully discussed, there was no provision in the Osage Allotment Act by which title was held in trust for the allottee. Therefore, the title of a restricted Osage Indian cannot be inferior to that held by the Stockbridge and Munsee Indians.

The character and quantum of title that passes under a trust patent to a restricted Indian was directly at issue in the case of *Oklahoma* v. *Texas*, 258 U. S. 574, 42 Sup. Ct. 406. In that case conflicting claims were made to the bed of the Red River. Among other contentions made, was the contention that no right passed to the river bed under allotments to restricted Indians prior to the issuance of a final patent. In disposing of this contention this Court said at page 596 of the U. S. Report that:

> "The Indian allotments were made in 1909 and 1910, but have not been carried to final patents. They are evidenced by trust patents, so-called, wherein the United States engages to hold the land for a period of 25 years 'in trust for the sole use and benefit' of the allottee, or of his heirs in the event of his death, and at the end of the trust period to convey the same to him, or to his heirs if he be not then living. The contention is made that no right to the river bed could pass under these allotments in advance of the issue of the final patent. Even if this were so, it well may be

> doubted that it would enable strangers to fasten any claim on or appropriate the bed in front of the allotments. But we think it is not so. The allotments when perfected passed the equitable title and beneficial use to all that would have passed under a full patent. The purpose of the holding in trust by the United States is to prevent allottees from improvidently alienating or incumbering the land, not to cut down or postpone their rights in other respects."

The character of a restricted Osage Indian's title is clearly shown by the applicable treaties and acts entered into and passed in connection therewith and which we will now discuss.

In July, 1866, the United States entered into a treaty with the Cherokee Tribe of Indians, by the terms of which it was agreed that the United States might settle friendly Indians in that part of the lands of the Cherokees lying west of the 26th degree of longitude. This land had theretofore been by the United States conveyed to the Cherokees to be by them held in common, and is the land later conveyed to the Osages. It was further provided in the treaty that the boundaries of each district should be distinctly marked, and the land conveyed in fee simple to each of the friendly tribes, to be held in common or by their members in severalty as the United States might decide. We quote this last referred to provision:

> "ARTICLE XVI. The United States may settle friendly Indians in any part of the Cherokee country west of 96°, to be taken in a compact form in quantity not exceeding one hundred and sixty acres for each member of each of said tribes thus to be settled; the boundaries of each of said districts to be distinctly

marked, *and land conveyed in fee simple to each of said tribes to be held in common or by their members in severalty as the United States may decide.*" (Emphasis supplied.)

In 1883, pursuant to the treaty with the Cherokees, the Cherokees, as first party, and the United States executed a deed to the lands covered in the treaty of 1866.

The first two paragraphs of the deed read as follows:

"THIS INDENTURE made and entered into this fourteenth day of June A. D. eighteen hundred and eighty three, between the Cherokee Nation, by Dennis W. Bushyhead, Principal Chief, Richard M. Wolfe and Robert B. Ross, delegates of said Cherokee Nation, for and in behalf of said Nation, of the first part, and the United States of America, in trust for the use and benefit of the Osage and Kansas Indians, of the second part, Witnesseth: that,

"WHEREAS by the sixteenth Article of the treaty concluded July nineteenth, A. D. eighteen hundred and sixty six, between said Cherokee Nation and the United States, the said United States acquired the right 'to settle friendly Indians on any part of the Cherokee country west of the ninety six degree' of west longitude, under certain limitations therein mentioned, and"

There follows recitations concerning an Act of Congress of 1872 by which certain land was set aside for the use of the Great and Little Osage Tribes; an Act of Congress under which the proceeds of the sale of Osage lands in Kansas was set apart to the credit of the Cherokee Nation and an Act of Congress by which certain monies was appropriated to be paid into the treasury of the Cherokee Nation. It was then recited that in consideration of certain sums of money the Cherokees convey the land therein de-

scribed to the United States "in trust nevertheless and for the use and benefit of the said Osage and Kansas Indians."

The habendum clause reads as follows:

> "TO HAVE and TO HOLD the said premises, as above described with the appurtenances, unto the said party of the second part, for the use and purposes aforesaid."

Before discussing the provisions of the deed further, we wish to direct the Court's attention to Section 12 of an Act of Congress approved July 15, 1870 (16 S. L. P. 335) and wherein it was provided that the Great and Little Osages, when they had agreed, should be by the President removed from "the State of Kansas to lands provided or to be provided for them for a permanent home in the Indian Territory, to consist of a tract of land in compact form equal in quantity to one hundred and sixty acres for each member of the tribe."

The Osages subsequently moved to the Indian Territory and settled on what they believed to be the lands previously selected for them. After a survey had been made it was learned that the Osages had inadvertently settled on the wrong land. In 1872 (S. L. pp. 228-229) Congress passed an Act by the terms of which the Osages were permitted to retain the lands they then occupied and which were the lands by them occupied at the time of the Osage Allotment Act. It was provided in the Act of 1872 "that the location as aforesaid shall be made under the provisions of Article sixteen of the treaty of eighteen hundred and sixty-six, so far as the same may be applicable thereto."

The deed under discussion, therefore, represents the culmination of these things: (a) an agreement in connection with the consideration to be paid the Cherokees; (b) an acceptance on the part of the Cherokees of the Osages as being one of the friendly Indian Tribes that would be permitted to take fee simple title to a part of the lands included in the treaty of 1866; (c) an acceptance by the Osages of the lands they then occupied as their permanent lands and (d) a ratification by Congress of the Treaty of 1866 and all Acts made in connection with securing unto the Osages a permanent home.

No one will contend that the United States attempted to acquire the lands included in the deed for itself. Not once, but several times, it is recited in the deed that the United States was taking title in Trust. Why was title taken in trust? The answer is obvious. Title was taken in trust in order to comply with the solemn agreement with the Osages to provide for them a permanent home in what is now Oklahoma and the equally as solemn agreement with the Cherokees to place fee simple title either in common or severalty in the Indians that would be permitted to take lands covered in the Treaty of 1866. The United States did not wish to place the Osages in a position where they could alienate the lands, and by taking title in trust this possibility was circumvented. In brief, by taking title in trust the ownership of the Osages in the lands was effectively restricted, but this does not mean that the character or quantum of their title was debased.

To follow the appellant's contention that a vesting of fee simple title in the mineral rights, trust and surplus funds of the Osages was postponed until 1984, or an additional time if Congress saw fit to extend the time, would do violence to both the provisions of the Treaty of 1866, the Acts of Congress made in connection with the Osages and their lands and of the Allotment Act of 1906.

It is true that the United States did not agree to place fee simple title in the Indians that settled the land covered by the Treaty of 1866 at any particular time, but to say that the United States could and would postpone doing so for 127 years or longer is both unreasonable and unwarranted under the facts.

The general allotment act covering the lands and properties of the Osages became effective on June 28, 1906, (34 S. L. 539). It was therein stated and provided that the roll of the tribe should be established and each member was declared to be entitled to an equal share of "the tribal lands and tribal funds"; provision was made for the allotment to each member of a 160 acre "homestead," and a "surplus" allotment of about 500 acres.

Section 2 (7) provides that the Secretary of the Interior might, upon request, issue to an adult member of the tribe "a certificate of competency, authorizing him to sell and convey any of the lands deeded by reason of this Act, except the homestead * * * ."

In connection with the character of title conveyed to the allottee it was provided in Section 7:

"That the lands herein provided for are set aside for the sole use and benefit of the individual members of the tribe entitled thereto, or to their heirs, as herein provided."

In connection with the mineral interests it was provided in Section 3 that the minerals were "reserved to the Osage tribe for a period of twenty five years from and after the eighth day of April nineteen hundred and six."

Section 4 provides that all money due or to become due to the tribe shall be held in trust by the United States, but shall be "placed to the credit of the individual member of the * * * tribe on a basis of a pro rata division among" such members "as shown by the * * * roll of membership, * * * or to their heirs" and should draw interest and that the interest should be paid quarterly to the members.

Section 5 provides that at the expiration of the trust period the "lands, mineral interests, and moneys, * * * held in trust by the United States shall be the absolute property of the individual member of the Osage tribe."

It was also provided in Section 5 that at the expiration of the restricted period "deeds to said lands shall be issued to said members, or to their heirs, as (therein) provided, and said moneys shall be distributed to" the members or their heirs, and the member or heir shall have "full control of said lands, moneys and mineral interests."

Section 6 provides "that the lands, moneys, and mineral interest * * * of any deceased member of the Osage

tribe shall descend to his or her legal heirs, according to the laws of the Territory of Oklahoma * * * ."

The appellant insists that by the terms of Section 5, and after the expiration of the restricted period, an Osage could not have title to the mineral interests until the United States issued a deed to him. If this be true of an Osage, it would be true of a white man who inherited a headright. This contention is without merit. In Section 5 three classes of property are considered, to-wit: lands, moneys and mineral interests. The language used in connection with the issuance of a deed is this: "deeds to said lands shall be issued," and it is nowhere in the Allotment Act provided that deeds shall be issued to the mineral interests at the expiration of the trust period. To the contrary the language used in connection with what shall happen to the mineral interests is that at the expiration of the restricted period the Osage, or his heirs, shall have "full control over said lands, moneys and mineral interests."

The language employed in connection with the issuing of a deed to lands at the expiration of the restricted period is surplusage. The Osages received deeds to their lands in 1909, which deeds conveyed a fee simple title subject only to the restrictions then existing or that might thereafter be imposed. Appellant will admit that when a certificate of competency is issued to him, without more an Osage has merchantable fee simple title to his surplus lands. The same situation would result as to all properties at the expiration of the restricted period. The fact that

the restrictions do not run with the land but depend on whether or not the owner is restricted is settled in *Levendale Lead & Zinc Mining Co. et al.* v. *Coleman,* 241 U. S. 432, 36 Sup. Ct. 644.

In that case Charles Coleman, a white man and husband of a deceased restricted full-blood Osage woman, inherited certain Osage land from his wife and a son who was a restricted Osage. After so inheriting the land he conveyed it by warranty deed to the Levendale Lead & Zinc Mining Company. Thereafter, he caused a quiet title action to be instituted against the grantee. His contention was, although no Indian owned an interest in the land conveyed when he conveyed it, that the restrictions imposed by Congress ran with the land and therefore the land was restricted in him. The Supreme Court of Oklahoma (43 Okla. 13, 140 Pac. 607) sustained this contention. This Court on appeal held, after reviewing the Allotment Act, that the restrictions did not run with the land but were limited to the individual holding title. We quote this portion of the opinion:

> "The provisions of the allotment act must be construed in the light of the policy they were obviously intended to execute. It was a policy relating to the welfare of Indians—wards of the United States. The establishment of restrictions against alienation 'evinced the continuance, to this extent, at least, of the guardianship which the United States had exercised from the beginning.' (Citing cases.) This policy did not embrace white men—persons not of Indian blood—who were not as Indians under national protection, although they might inherit lands from Indians; and,

with respect to such persons, it would require clear language to show an intent to impose restrictions."

We direct the Court's attention to the fact that Coleman did not obtain a deed from the United States or from any one else before he conveyed. The deeds from the principal chiefs, approved by the Secretary of the Interior, in 1909, together with the fact that Coleman was the heir of his Osage wife and father of an Osage child, completed his chain of title.

The appellant will not dispute the fact that a certificate of competency to an Osage Indian places in him full right to the enjoyment of the title he already had to all of his properties, save the right to sell the homestead, and save the right to grant mineral leases, without the issuance of a deed from the United States. He is then entitled to take all moneys accruing to his headright. This fact is established in the case of *Choteau* v. *Burnett*, 283 U. S. 691, 51 S. Ct. 598. The certificate of competency vested no new title but merely recognized the title already owned in fee.

In the *Choteau* v. *Burnett* case, Choteau, an Osage Indian, had been granted a certificate of competency. He had been assessed income taxes under the Federal Income Tax Act, and defended against the assessment on the theory that the income was exempt because of his status as an Indian, and urged that the moneys he received as the owner of interests in headrights was a gift. In holding that the income was taxable this Court discussed the object and

purpose of the Osage Allotment Act. We quote from Page 694 of the U. S. Report this portion of the opinion:

> "The course of legislation discloses that the plan of the government has been gradually to emancipate the Indian from his former status as a ward; to prepare him for complete independence by education and the gradual release of his property to his own individual management. This plan has included imposing upon him both the responsibilities and the privileges of the owner of property, including the duty to pay taxes. Pursuant to this policy, the act of 1906 directed the allotment to each member of the Osage Tribe of a homestead of 160 acres to be chosen by him, which was to be inalienable and nontaxable for twenty-five years or during the life of the allottee. After setting apart such homestead to each, the surplus lands were all to be equally divided and allotted amongst the members. Section 2, seventh, of the act provides that the Secretary of the Interior, after due investigation, may issue certificates of competency to members of the tribe. It declares that 'upon the issuance of such certificate of competency the lands of such member (except his or her homestead) shall become subject to taxation, and such member (with exceptions not here material) shall have the right to manage, control, and dispose of his or her lands the same as any citizen of the United States.' Since 1910, when he received his certificate, petitioner has therefore been taxable upon his allotted lands, except his homestead, and they have been freely alienable."

This Court goes on to say that after a certificate of competency has been issued to an Osage Indian he is fully emancipated, except in the matter of conveying his homestead and the granting of mineral leases. That "his share of the royalties from oil and gas leases is payable to him, without reservation upon his use of the funds so paid."

In *Taylor* v. *Irwin* (C. C. A. 10th), 60 Fed. (2d) 495, the Court held that an Osage headright, owned by a person not of Indian blood, passed to his trustee in bankruptcy. Therefore, that a white person could sell an Osage headright.

In its opinion, in this case the Supreme Court of Oklahoma stated that:

> "We reject at once as untenable the assertion that the title to this property remained in the federal government under the various laws applicable to the Osages. *Globe Indemnity Co.* v. *Bruce*, 81 Fed. (2d) 143, and *In: Martin's Estate*, 183 Okla. 177, 180 P. (2d) 561. * * * "

The appellant insists that this statement of the law is erroneous and if the Supreme Court of Oklahoma had not arrived at this erroneous conclusion as to title not being in the United States, it would have held for the Osages.

The appellee says that the statement so made by the lower court is the law, and submits it is sustained by the authorities.

In her argument the appellant overlooks the fact that the tax here involved is not a tax on property but is a tax imposed upon the shifting of economic benefits and the privilege of transmitting or receiving such benefits. That benefits were transferred to and received by the heirs is not subject to dispute, and these facts are developed in the cases cited by the Supreme Court of Oklahoma in support of the above quotation, as an examination of those cases will disclose.

In the *Globe Indemnity Co.* v. *Bruce* case, 81 Fed. (2d) 143, decided by the 10th Circuit Court of Appeals, the question presented was whether or not the county court acquired jurisdiction of the quarterly payments that accrued to the credit of a deceased Osage woman of less than one-half Indian blood who had received a certificate of competency. The court held that such funds could be used in paying debts of the estate, and, therefore, that the county court had jurisdiction over the quarterly funds. In discussing the title of an Osage Indian in a headright, the Court said at page 150 that:

> "We are of the opinion that the United States took the legal title to the funds and moneys in trust, but that the beneficial title to the funds and moneys vested in the individual members of the tribe; that there was reserved to the tribe an interest in the minerals for a stated period; and that the reversionary interest in the minerals vested in the members of the tribe to whom were allotted the surface, all subject to the paramount power of Congress to deal with such property for the benefit of the tribe and its members.
>
> "This view is strengthened by a consideration of section 6 of the Act of June 28, 1906 (34 Stat. 545), which refers to 'the lands, moneys, and mineral interests,' of a 'member of the Osage tribe,' and provides such 'lands, moneys, and mineral interests * * * shall descend to his or her legal heirs.' This section indicates that a present equitable interest in the lands, moneys and mineral interests vested in the members of the tribe and on the death of a member descends to his heirs."

In the other case cited in the quotation, *In re: Martin's Estate*, 183 Okla. 177, 180 Pac.(2d) 561, the Court in

speaking of the title to Osage Indian properties says at page 181 of the Oklahoma Report that:

> "The Osage Nation has no heirs, nor property subject to succession. All the lands, moneys, and other properties commonly said to belong to that nation and yet remaining undistributed to the individual citizens thereof, or their heirs, are now held in trust by the United States for the use and benefit of the individual citizen, or his heirs who are eligible. Act Cong. March 2, 1929, 45 Stat. L. 1478. The individual citizen, or his heirs, has a vested undivided interest in such lands, moneys, or other properties, and such interest is an estate that may pass from the citizen to his heirs by inheritance, not from the tribe to such heirs. In *Globe Indemnity Co.* v. *Bruce*, 81 Fed. (2d) (C. C. A. 10) 143, 150, the court, speaking of section 6 of the Act of Congress of June 28, 1906, said:
>
> " 'This section indicates that a present equitable interest in the lands, moneys, and mineral interests vested in the members of the tribe and on the death of a member descends to his heirs.'
>
> "In referring to the 'lands, moneys, or mineral interests of the Osage Tribe,' Congress could have meant nothing other than the vested interests of the individual member thereof, which interest included his allotted lands and moneys and his vested, though undivided, interest in the minerals and other property commonly referred to as lands and mineral interests of the Osage Tribe. Congress was dealing with individual estates, for there was no other property to deal with. It merely referred to such individuals collectively as the Osage Tribe."

It is the shifting of economic benefits and the privilege of transmitting or receiving such benefits that Oklahoma here seeks to tax. It does not here seek to tax the properties of the Osage Indians as such.

The "Title" Cases Relied Upon by Appellant

In the cases cited and relied upon by appellant as supporting her contention that title was in the United States, the tax sought to be imposed was an ad valorem tax, not an excise tax, and which fact within itself distinguishes the cases from the case at bar.

We first refer to the case of *McCurdy* v. *United States*, 264 U. S. 484, 44 Sup. Ct. 345, and in which Osage County sought to impose an ad valorem tax on certain lands belonging to restricted Osages. The tax was assessed prior to the date and time that the allotment deeds were executed by the principal chiefs and approved by the Secretary of the Interior. In connection with the proposition of where title rested before the execution and approval of the deeds this Court said:

> "Title was in the United States on the date on which the assessment was made, and did not pass until the execution of the deeds. Section 8 * * * "

In brief, title was in the United States before the allotment deeds were executed and approved and in the individual Osages after they were executed and approved. The opinion therefore supports the appellee's contention. When title passed upon the execution and approval of the allotment deeds, the United States could not thereafter divest the Osages of title, without their consent. 27 Am. Jur. page 564.

In *United States* v. *Rickert*, 188 U. S. 432, 23 Sup. Ct. 478, ad valorem taxes were assessed on certain per-

manent improvements and personal property of the Sisseton band of Sioux Indians, and which assessments were attacked by the United States as a cloud on the lands of the United States.

This Court pointed out that under the Allotment Act there involved, the patents issued to the Indians shall declare that "the United States does and will hold the land thus allotted * * * in trust for the sole use and benefit of the Indian to whom such allotment shall have been made * * * and that after the expiration of said period the United States will convey the same by patent to said Indians." That the word "patent" as used in the first part of the quoted portion of the Act, the word having various meanings, should be construed as used as imparting:

> " * * * nothing more than instruments or memoranda in writing, designed to show that for a period of twenty-five years the United States would hold the land allotted, in trust for the sole use and benefit of the allottee, or, in case of his death, of his heirs, and subsequently, at the expiration of that period—unless the time was extended by the President—convey the fee, discharged of the trust and free of all charge or encumbrance. In other words, the United States retained the legal title, giving the Indian allottee a paper or writing, improperly called a patent, showing that at a particular time in the future, unless it was extended by the President, he would be entitled to a regular patent conveying the fee."

Therefore, the Indian did not have and possess the character of "title" that rested in the Osages under the Osage Allotment Act and the deeds executed pursuant thereto.

In *United States* v. *Board of Comr's* (C. C. A. 10th), 145 Fed. (2d) 329, Freemont County, Wyoming, assessed ad valorem taxes on land purchased by the United States for certain Shoshone Indians. Among other things provided for in the Act providing for a purchase was the following:

> " * * * and Section 6 provides that title to all land purchases made hereunder shall be taken in the name of the United States in trust for the Shoshone and Arapaho Tribes of the Wind River Reservation, and that all purchases shall have the approval of the Tribal Council, or the business committees thereof."

No such provision is to be found in any act or deed touching the title of an Osage.

Another case cited by appellant is *United States* v. *Thurston County*, 143 Fed. 287. Again we find that the tax assessed was an ad valorem tax, and that "the United States (held) each of (the allotments) 'for a period of twenty five years in trust for the sole use and benefit of the Indian to whom such allotments shall have been made, or in case of his decease, of his heirs.' " The assessment was on lands of the Omaha and Winnebago tribes and was made during the twenty-five year period.

At page 289 the Court says:

> "They are still members of their tribes and of an inferior and dependent race, of which the Supreme Court has said that 'from their very weakness and helplessness, so largely due to the course of dealing of the federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever this question has arisen.' "

In the instant case the Osages are and have been for many years citizens. They are not "still members of their tribe," and the United States does not hold title to these Indians' lands in trust.

One of the basic distinctions between an ad valorem tax and an estate tax is that an ad valorem tax is often confiscatory and an estate tax isn't. An Indian in modest financial circumstances may find it impossible to pay an ad valorem tax assessed on his home, and though the tax may be small his home may be sold to satisfy the unpaid assessment. He thereby loses his home and may become destitute. The basic exemption under the Oklahoma estate tax law, where the estate goes to lineal heirs or surviving spouse, is $15,000.00. In computing the tax on the estate of an Indian, Oklahoma exempts the homestead irrespective of value and allows an exemption of $5,000.00 if the homestead is of a value under $5,000.00; expense of administration and a basic exemption of $15,000.00 where the estate is transmitted to lineal heirs. Let us turn to the record and see the amount of the exemption allowed in these cases: The exemption allowed in the West estate was $26,507.80 (R. 8A.) ($15,000.00 basic exemption; $5,000.00 homestead and $6,507.80 expense last sickness, of administration, etc.) The exemptions allowed are such that an Indian could never be made destitute by the assessing of this tax.

The Indian was granted an exemption from ad valorem taxes on his homestead in order to preserve to him

a home. (The surplus land of the Osages have been subject to an ad valorem tax for many years.) The preservation of a home was the object and purpose of the tax and we respectfully submit that it was never intended that an exemption be allowed an Indian from an estate tax. This tax could never destroy his home. Appellee respectfully points out that this Court so held in the *Five Civilized Tribes* case.

At page 11 of her brief, appellant cites and quotes from *Adams* v. *Osage Tribe of Indians* (C. C. A. 10th), 59 Fed. (2d) 653, as supporting her contention that title to the minerals is held by the United States in trust.

The appellant merely quotes the contention made by the United States as stated by the Court. The Court did not hold that title to the minerals was held in trust by the United States and to the contrary held that title and ownership was in the Osages. In the body of the opinion the Court said that Congress had full power, when it passed the Allotment Act, to make provision safeguarding the communal estate (the mineral rights under all of the lands of the Osages), and that "the necessary effect of this was to withhold the minerals from division, for the use and benefit of the tribe, not disturbing the tribe's communal equitable estate in them. It further provided that the minerals should become the property of the individual owners of the allotted lands at the expiration of twenty-five years from and after April 8, 1906 * * * and during this twenty-five years while the minerals remained communal prop-

erty," and during any extended restricted period, the restricted Osage could not maintain an action to quiet title to the minerals under his land.

The statement that the minerals were the "communal property" of the members of the Osage Tribe, or the statements in other cases cited by appellant that title was in the Osage Tribe, certainly is not authority supporting the contention of the appellant that title to the minerals is held in trust by the United States. In fact, it is authority supporing appellee's contention.

We repeat, that Oklahoma does not here seek to impose a tax on property as such. It seeks to impose a tax on the shifting of economic benefits from the dead to the living. So the matter of who holds title is not here determinative. What is determinative is whether beneficial rights were transmitted in the minerals and the other properties here involved. The United States definitely did not own or possess any beneficial ownership. It could take no part of the *corpus* or of the income therefrom for itself and all of which will eventually go to the Osages.

In connection with the minerals, the record discloses that the mineral rights under all of the lands was communitized. After having been communitized the communal estate thus created was divided pro rata among the original allottees, 2,229 in number. After having been so divided each allottee owned 1/2229th of the whole, and his ownership and that of his heirs was absolute. From then on he was entitled to 1/2229ths of all bonuses or production accruing to the whole, which he was not compelled to

share with any one. The Osage Tribe as a tribe had no right, title or interest in minerals after this division. Any member thereafter born into the tribe had no right, title or interest in the minerals because of his membership. If he ever took or received an interest it was through devise or inheritance from either an original allottee or some one who had taken under this original allottee. His interest in the minerals was in fact no different than that of the son or daughter of non-Indians in the properties of their parents and relatives. The white child takes by devise or inheritance and this is the only way the Osage Indian child may take. The fact that ownership is in the individual, and no one else, is illustrated by the fact that a non-Indian owner can sell his headright [*Taylor* v. *Irvin*, 60 Fed. (2d) 495] and that a headright can be sold to pay certain debts of an Osage. See page 147 of 81 Fed. (2d): Title passes under these sales without any action on the part of the tribe. Any action required by the Secretary of the Interior is because of the supervisory capacity conferred upon him.

The Osage Allotment Act effected a severance of the minerals from the surface, but this fact did not affect the title and ownership that came to rest in the Osages. It is to be remembered that the severance was not for the restricted period alone. The severance was for all time to come, and at no time will an original allottee, or his successors in title, ever own all of the minerals under any particular allotment. The ownership will always be a frac-

tional part of the whole. The Allotment Act made the whole of the lands of the Osages a unit, and divided this unit into units of 2,229ths equal parts. The plan was probably new and novel in 1906, but it isn't today. The expense incident to drilling test wells for oil and gas has been many times financed through a very similar plan. The owner of the lease divides it into a certain number of units, and sells some of the units to the public. If production is had the owner of a unit shares therein in the proportion that his unitized interest bears to the whole, and which "whole" is the original unit, the leasehold estate.

In connection with the production of oil and gas under the lands of the Osages, and bonuses received for oil and gas leases, we remind the Court that more than seventy-five per cent of it came from surplus lands and less than twenty-five per cent from homesteads. The appellant, therefore, is contending that all of the accruals from oil and gas production be exempted from an Oklahoma estate tax, notwithstanding more than seventy-five per cent comes from lands subject to ad valorem taxes.

The funds on hand in the United States Treasury at the date of the Osage Allotment Act, in the main came from the sale of certain lands of the Osages to the Kansas Indians. Let us turn to the basic instrument under which the United States conveyed to the Kansas Indians. This is the treaty of 1866 between the United States and the Cherokees. It was therein provided that the United States would convey in fee simple to each of the tribes therein

designated to whom it could so convey, and that the tribe to whom it conveyed should hold fee simple title by their members or in severalty. By the terms of this treaty the Osages, being a friendly Indian Tribe that received lands covered in the referred to treaty, took fee simple title either in common or in severalty, and having taken such ownership it was not debased or lessened when the lands were converted into money through the sale to the Kansas Indians. It is not necessary to determine whether their interest was communal in the funds when received; we suggest that it was. The fund by the terms of Section 4 of the Osage Allotment Act was divided into equal 2229ths parts and "placed to the credit of the individual membership * * * or their heirs." At all times since the funds were so divided the Osage allottee, or his heirs, has owned in his own right the share so distributed subject only to the restrictions placed thereon by the United States as the guardian of the Osages.

We have discussed all of the properties of the Osages except properties purchased for the individual Osages from funds held in trust by the United States, which funds were and are credited to the individual Osage's account. If the property purchased was real estate it was subject to ad valorem taxes and accordingly taxed. Any other properties purchased should be considered for estate tax purposes the same as the real estate and the funds with which they were purchased, and for such reason should be held to be properly includable in the estate for state tax purposes.

The fact that the United States pays interest on the funds of the Osages that it withholds from them, cannot be reconciled with the assertion that title is in the government. The owner of monies does not charge and collect interest thereon from himself. The allowance of interest is within itself a recognition on the part of the Federal government that the Osages are the owners of the funds.

The appellant says that the question of "title" was not presented by the United States in the *Five Civilized Tribes* case and was not passed on by this Court in that case. We suggest that the question was not presented for the reason that an estate tax is not imposed on property, but is an excise tax imposed on the transfer and receipt of economic benefits. While admitting that it was not directly presented, the appellant asserts that the Court effectively adjudicated this question favorably to the appellees. We refer to the case in support of our statement.

This Court distinguished the *Rickert* case, which case is the basis of appellant's contention, upon at least three grounds: First, in the *Rickert* case the rights and privileges of citizenship had not been bestowed upon the Osages (Congressional Act of March 3, 1921, Sec. 3, 41 Stat. 1250, did this) and the Osages on that date preserved their tribal status. Second, title was held in trust by the United States when the *Rickert* case arose, but as stated in the opinion title passed when the provision of the Allotment Act had been carried out by the execution and approval of the deeds. Third, that the Oklahoma estate tax is a tax based

solely upon ability to pay, therefore, not an ad valorem tax that may be confiscatory.

PROPOSITION No. 2

The imposition of an Estate Tax would not interfere with the government's duty to the Osages by diminishing the trust estate.

The above statement is a counter proposition to appellant's second contention, under which she asserts the imposition of the tax in controversy would interfere with the Government's duty to the Osage Indians by diminishing the trust estate; that if such taxes are permitted to be imposed the Government would not be in a position to meet the requirements of the Osage Allotment Act to the effect that the properties "shall be the absolute property" of the Osages at the expiration of the trust period.

The appellee suggests that the imposition of the tax in controversy will do no more to make it impossible to deliver *all* properties intact to the Osages at the expiration of the trust period, than does the imposition of a Federal estate tax. The fact that a Federal estate tax is imposed on the estates of restricted Osages is fully sustained by a letter from the Treasury Department to appellee. This letter is under date of August 16, 1944. Therein the Treasury Department not only states that the Federal government imposes the tax, but states the reason for doing so. The letter is short and we append a copy thereof to this brief.

Reluctantly the appelant admits in her brief that a Federal estate tax is imposed on the estates of restricted Osages, but suggests that this fact does not within itself establish the right of the Federal government to impose such a tax. We are unable to find where the exact question has been adjudicated, but the right to collect the tax is fully established in the *Five Tribes* case and in *Landman* v. *Commissioner*, 123 Fed. (2d) 787.

Repeating, we point out that in the *Five Tribes* case this Court held that:

> " * * * Congress cannot have intended to impose federal income and inheritance taxes on the Indians and at the same time exempt them by implication from similar state taxes."

Immediately preceding the quoted language this Court had cited the *Landman* case with approval and observed that under the authority of that case Indian estates were subject to Federal estate taxes.

Repeating again, we quote from the *Landman* case as follows:

> "There is nothing in the treaties or the Acts of Congress, confirmatory thereof, which prohibits the imposition of a tax on the right to inherit or succeed to non-taxable property rights. Here the tax falls upon the transfer or shifting of the economic benefits and not upon the property of which the estate is composed. It therefore is not within any constitutional immunity growing out of a contract or agreement between the United States and the Creek Indian, as characterized by the Act of April 26, 1906."

The estates of Indians are subject to both a Federal and State estate tax for the simple reason that the tax is

imposed upon the shifting and transmitting of economic benefits as the result of death, and because there is no law prohibiting the imposition of such a tax.

The appellant points out that the 10th Circuit Court in *Blackbird* v. *Commissioner* (C. C. A. 10th), 38 Fed. (2d) 976, held that the income of a restricted Osage was not subject to a Federal tax. The basis of the opinion holding that a restricted Indian was not subject to Federal income taxes was based upon the proposition that the Indian was not included within the Federal Income Tax Act.

Several years after the *Blackbird* case was decided, this Court in *Superintendent of Five Civilized Tribes* v. *Commissioner*, 295 U. S. 418, 55 Sup. Ct. 820, held that the Circuit Court erred in the *Blackbird* case, and that a restricted Indian comes within the provisions of the Federal income tax law and that his income is subject to tax. This last referred to case has not been overruled, so we say that the income of restricted Indians is now and has been since the case was handed down subject to Federal income taxes.

In the face of the decision in the *Five Tribes* case holding that the right of a State to impose an estate tax on the estate of an Indian will not be denied where the Federal government imposes such a tax, appellant cites and quotes from *New York* v. *United States*, 326 U. S. 572, 66 Sup. Ct. 310, as holding that the Federal government can impose a tax on one of its instrumentalities and deny this right to a State.

This Court did not overrule the *Five Tribes* case in the *New York* case, and the appellant does not claim that it did. In that case the State of New York contended that the mineral waters it sold were exempt from Federal tax for the reason New York in selling the water was engaged in a "usual, traditional and essential governmental function". This Court held that New York had entered the market places the same as does an individual, and when it did so it divested itself of its quasi-sovereignty and assumed the character of a trader. As a trader it was subject to the tax, and the basis of the opinion was not and could not have been the right of the United States to tax one of its instrumentalities and deny the right to a State. This we say for the reason that the taxing of a Federal instrumentality was not involved. We do wish to point out that this Court, in speaking of the "instrumentality rule" had this to say at page 576 of the U. S. Report:

> "But the fear that one government may cripple or obstruct the operations of the other early led to the assumption that there was a reciprocal immunity of the instrumentalities of each from taxation by the other. It was assumed that there was an equivalence in the implications of taxation by a State of the governmental activities of the National Government and the taxation by the National Government of State instrumentalities. This assumed equivalence was nourished by the phrase of Chief Justice Marshall that 'the power to tax involves the power to destroy.' *McCulloch* v. *Maryland*, 4 Wheat. 316, 431, 4 L. Ed. 579. To be sure, it was uttered in connection with a tax of Maryland which plainly discriminated against the use by the United States of the Bank of the United States as one of its instruments. What he said may not have

been irrelevant in its setting. But Chief Justice Marshall spoke at a time when social complexities did not so clearly reveal as now the practical limitations of a rhetorical absolute. (Citing cases.) The phrase was seized upon as the basis of a broad doctrine of intergovernmental immunity, while at the same time an expansive scope was given to what were deemed to be 'instrumentalities of the government' for purposes of tax immunity. As a result, immunity was until recently accorded to all officers of one government from taxation by the other, and it was further assumed that the economic burden of a tax on any interest derived from a government imposes a burden on that government so as to involve an interference by the taxing government with the functioning of the other government. (Citing cases.)"

And this at page 581 of the same report:

"In the older cases, the emphasis was on immunity from taxation. The whole tendency of recent cases reveals a shift in emphasis to that of limitation upon immunity." (Emphasis supplied.)

In the *New York* case this Court again says that it is still committed to a shift away from the old cases prohibiting many taxes on the theory that the tax burdens a governmental instrumentality, and this shift and new trend away from prior decisions is reflected in the *Five Tribes* case, *Helvering* v. *Mountain Producers Corporation* and others of the same purport.

The appellant under this proposition cites *U. S.* v. *Board of Com'rs of Osage County*, 193 Fed. 485, and the opinion on appeal in that case, reported in 216 Fed. 883, that title to the minerals under the allotted lands of the Osages is in the Osage Tribe. This case involved the im-

posing of ad valorem taxes, as do the other cases relied upon by appellant in connection with who in fact holds title.

We say that the original allottee took a fee simple restricted title to the 1/2229ths interest or unit assigned him. In any event, he became the equitable owner of the unit with all the rights incident to such ownership except the right to lease and sell and to take all of the income after the year 1925. Prior to that year he took all income accruing to the unit. As hereinbefore stated, no member born into the tribe after 1909 took any right, title or interest in any part of the minerals because of the fact that he became through birth a member of the tribe. He could never have any right, title or interest except by devise or by the operation of the laws of descent and distribution. (They could buy an interest.) It is the passing of an interest in the minerals by devise or the operation of the laws of descent and distribution, neither of which is a "federal instrumentality", that Oklahoma here seeks to tax.

The Osage Indians here, as did the Indians in the *Five Tribes* case, take under and by virtue of the laws of Oklahoma. They are citizens of Oklahoma with all the accompanying rights and privileges, and no good reason can be advanced why they should not shoulder the taxes imposed by the State of Oklahoma along with its other citizens.

PROPOSITION No. 3

The tax imposed is an excise tax imposed upon the shifting of economic benefits and the privilege of transmitting and receiving these benefits.

The above statement is a counter proposition to the appellant's third contention, and under which she argues that nothing in fact was transmitted or received under the will in the Dora Neal Rector Estate or under the laws of descent and distribution in the Charles West, Jr., Estate, upon which an estate tax could be imposed.

The fact that restricted Indians are here involved has nothing whatever to do with appellant's position under this proposition. If she is correct, an estate tax could not be imposed though the estates were those of non-Indians.

Before discussing any authorities we wish to note what we believe to be the common sense answer to the contention made by appellant under this proposition.

If nothing was owned by the deceased Indians and if nothing passed to their devisees and heirs at law why were the estates probated? The answer is that they were probated because valuable property rights were transmitted. What were these rights? (1) The very valuable right attaching to the ownership of an Osage headright, which ownership entitled the owner to receive quarterly payments, often as much as $1,000.00 each quarter. (2) The right to take all properties at the expiration of the restricted period, and practically all, excluding the homestead and

the right to lease the mineral interest owned, if a certificate of competency was issued. (3) The right to occupy as a home the lands. (4) The right to graze or farm the lands and take all of the grain therefrom. (5) The right, subject to the approval of the Secretary of the Interior, to lease for farming or grazing the lands and take the lease money. These are the rights that rested in and that were owned by the deceased restricted Osages. These are the rights that were by will in one instance, and by the law of descent and distribution in the other, that were transmitted to the devisees and heirs. These were all valuable property rights capable of ownership that passed under the laws of Oklahoma. These are property rights that Mrs. Rector and Mr. West in their lifetime could dispose of by will. If an heir at law were devised nothing, he thereby lost the right to share in these valuable property rights. If he was named as a devisee he shared in them.

Property is defined by the Oklahoma statutes as follows:

> "The term 'property' includes estate and right to lands, tenements and hereditaments.
>
> "The term 'personal property' includes every description of money, goods, chattels, effects, evidences of right in action and written instruments by which any pecuniary obligation, right or title to property, real or personal, is created or acknowledged, transferred, increased, discharged or diminished.
>
> "The term 'property' includes both real and personal property."
>
> Title 25, Section 26, Subsections 1, 2, 3 and 4.

When the above quoted definition of property is here applied, the fact that property was owned by the deceased Indians and was transmitted to their heirs is inescapable.

Our contention is clearly expressed in the case of *In re: Martin's Estate*, 183 Okla. 177, 80 Pac.(2d) 561, in the following language:

> "* * * The Osage Nation has no heirs, nor property subject to succession. All the lands, moneys, and other properties commonly said to belong to that nation and yet remaining undistributed to the individual citizens thereof, or their heirs, are now held in trust by the United States for the use and benefit of the individual citizen, or his heirs who are eligible. Act Cong., March 2, 1929, 45 Stat. L. 1478. The individual citizen, or his heirs, has a vested undivided interest in such lands, moneys, or other properties, and such interest is an estate that may pass from the citizen to his heirs by inheritance, *not from the tribe to such heirs* * * *" (Italics ours).

In *Globe Indemnity Co.* v. *Bruce* (C.C.A. 10th), 81 Fed.(2d) 1943, the court had this to say at Page 150:

> "* * * This section indicates that a present vested interest in the lands, moneys and mineral interests vested in the members of the tribe and on the death of a member descended to his heirs."

The court says that this view is further confirmed by the granting of permission to make a will, the practice of approving wills by the Secretary of the Interior, and that,

> "* * * this practice recognized that a member has a vested reversionary interest in the minerals and a vested interest in the trust funds which he may dispose of by will."

The court further points out that a "headright" is property and as such subject to be probated; that the per-

sonal representative took title to the headright and was accordingly entitled to the quarterly payments.

The estates of Osages were involved in the above referred to cases. In connection with whether property rights are owned and in fact pass upon the death of a restricted Indian we refer the Court to the *Five Civilized Tribes case* and *Landman* v. *Commissioner*. The "hollow estate" theory was directly presented in the *Landman case*, and the theory refuted.

We cite and quote from other cases that treat with the proposition of what interest the deceased must own, what interest must pass upon death, before a State can impose an estate tax. In the case of *Whitney* v. *State Tax Commission*, 309 U. S. 530, 60 Sup. Ct. 635, this Court held that it is not the decedent's enjoyment of property, nor even the acquisition of such enjoyment in their heir or devisee, that is the occasion of an estate tax, and that a tax can be laid irrespective of these facts. The facts in that case were briefly these:

Cornelius Vanderbilt created a trust under which a designated annual income was provided for his wife. The wife was given the power to will among the four children as she might choose, if she didn't exercise this power then the *corpus* to be divided equally among her four children. She chose to make a will.

We quote from Page 913 of the U. S. Report:

> "* * * She could not, that is to say, use the corpus of the trust herself, or appoint it to her estate; nor could she have applied it to her creditors. These quali-

fications upon Mrs. Vanderbilt's power over the appointive property had a significance during her lifetime which death transmitted. For when the end comes, no matter how absolute it may have been held, also comes to an end—except in so far as the power to determine its succession and enjoyment may be projected beyond the grave. But the exercise of this power is precisely the privilege which the state confers and upon which it seizes for the imposition of a tax. It is not the decedent's enjoyment of the property—the 'beneficial interest'—which is the occasion for the tax, nor even the acquisition of such enjoyment by the individual beneficiaries. Presumably the policy behind estate tax legislation like that of New York is the diversion to the purposes of the community of a portion of the total current of wealth released by death.

"In making this diversion, the state is not confined to that kind of wealth which was, in colloquial language 'owned' by a decedent before death, nor even to that over which he had no unrestricted power of testamentary disposition. It is enough that one person acquires economic interests in property through the death of another person, even though such acquisition is in part the automatic consequence of death, or related to the decedent merely because of his power to designate to whom and in what proportion among a restricted class the benefits shall fall."

The section of the New York statute under consideration in the *Whitney case* is set forth in the foot-note. It in substance is the same as Sub-section (3) of Section 989e, Title 68, O.S. 1941. This sub-section reads as follows:

"(3) To the extent of any interest therein of which the decedent has, at any time, made a transfer, in trust or otherwise, where the enjoyment thereof was subject, at the date of his death, to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend,

or revoke the terms of such trust, or where the decedent relinquished any such power in contemplation of his death, or where the decedent reserved to himself during his life the income from the property included in any such transfer."

We quote from *Graves* v. *Schmidlopp*, 315 U. S. 657, 62 S. Ct. 870, Page 872 of the U. S. Reporter:

"(1-3) For purpose of estate and inheritance taxation the power to dispose of property at death is equivalent of ownership (citing cases). It is a potential source of wealth to the appointee. The disposition of wealth effected by its exercise or relinquishment at death is one form of the enjoyment of wealth and is an appropriate subject of taxation. * * * His transfer of interest in intangibles, by virtue of the exercise of a donated power instead of that derived from ownership, stands on the same footing. In both cases the sovereign's control over his person * * *."

In *Commissioner of Internal Revenue* v. *Holmes' Estate*, 326 U. S. 48, 66 Sup. Ct. 257, it is pointed out at Page 260, U. S. Reporter, that an estate tax can be imposed on the shifting of economic benefits irrespective of the vesting of title.

In *Graves et al.* v. *Elliott et al.*, 307 U. S. 383, 59 Sup. Ct. 915, this Court held that the power of disposing of property is the equivalent of ownership for the purpose of imposing an estate tax.

The cases cited by appellant under this proposition are cases wherein the property was transferred and where the transferrer divested himself of all interest and the transferee's interest therein became fixed prior to the death. The death did not enlarge, diminish or change the rights of any-

one. Not so here. The devisees and heirs of the deceased Osages did not take any part or interest in the properties until the death. It was only because of the deaths and the laws of descent and distribution of Oklahoma in one estate, and the will in the other, that they took any interest and estate at all.

PROPOSITION No. 4

No immunity from the tax here imposed was ever granted by Congress.

Under the above proposition the appellee will discuss the appellant's fourth contention that "the immunity from State taxation of the classes of property involved has never been withdrawn by Congress." The contention so made by appellant was made by the United States in the *Five Tribes case*. In refusing this contention this Court said:

> "* * * that restriction, without more, is not the equivalent of a congressional grant of estate tax immunity for the cash and securities.
>
> * * * * *
>
> "None of these cases held, nor has this Court ever decided, that congressional restrictions of an Indian's income carried an implication of estate tax exemption.
>
> * * * * *
>
> "Unless the tax immunity is granted by the restriction clause itself, there is not a word in the Act which even remotely suggests that Congress meant to exempt Indians' cash and securities from Oklahoma's estate taxes. We conclude that this Act does not exempt the restricted property from taxation for two reasons: (1) the legislative history of the Act refutes the contention that an exemption was intended; and (2) application

of the normal rule against tax exemption by statutory implication prevents our reading such an implication into the Act.

* * * * *

"If Congress intended to prevent a general non-discriminatory estate tax applying alike to all its citizens, it should say so in plain words. Such a conclusion cannot rest on dubious inferences. * * *"

This Court then points out that the Indians are citizens of Oklahoma and as such have all the privileges of full-fledged citizens; that an estate tax is based on ability to pay, and that it was not unreasonable that a small part of the expense of the State and local governments be borne by the Indians.

The Creeks and Seminoles could not point to any Act of Congress or treaty specifically exempting their estates from estate tax, and this is likewise true of the Osages. The Osages urge, as did the Creeks and Seminoles, that the applicable laws imply a tax exemption. This Court held otherwise in the *Five Tribes case.*

The fact that the restricted members of the Five Civilized Tribes are as completely and fully restricted as are the restricted members of the Osages is made apparent in *Landman* v. *Commissioner, supra.* The court there said:

"Title to whatever articles were purchased for the benefit of the decedent was retained in the United States. The decedent had no control whatsoever over the restricted funds, except the right to the exclusive benefit thereof, or so much as in the judgment of the Superintendent was required for the maintenance of herself and family."

and,

> "* * * the heirs are likewise restricted Indians and the estate passed to the heirs by the simple expedient of transferring the account of the decedent with the United States Treasury to the restricted heirs according to their respective shares, which was effected by a bookkeeping transaction in the office of the Superintendent of the Five Civilized Tribes."

The office of the Federal government to the Osages is the same as it is to the members of the Five Civilized Tribes. The relationship in both instances is that of guardian in the Federal government and that of ward in the Indians. Through this relationship the Federal government exercises a limited control over the Indian. We say limited, because the Osage Indian has the right to till and graze his lands and to take without limitation or restriction any and all monies arising from this source. In discussing this relationship the court in the *Landman case* said that,

> "* * * we can find nothing in the nature of the control exercised by the Superintendent as the guardian of the Indian ward that would justify the application of the instrumentality rule,"

and, that,

> "* * * it is plain, therefore, that the dominion exercised over the estate of the decedent by the Superintendent was in the nature of a guardianship for the sole and exclusive benefit of the decedent and her family, and for her protection, and would not vest in the government a control exercised in furtherance of a public purpose now thought to be essential to exemption from taxes under the instrumentality doctrine."

The tax here imposed was not imposed on the property of anyone. The deceased Indian was dead and for such reason she no longer owned property. The devisees and heirs had not as yet received any property from the Osages that died. The tax attached as the economic benefits shifted from the dead to the living, and attached because of the right given to the living to take from the dead. The right to transmit and receive is not a natural right. It must flow from operation of law.

The fact that an estate tax is not a tax on the property transmitted is fully developed by the case of *United States* v. *Perkins*, 163 U.S. 625, 16 S.Ct. 1073. In that case property was bequeathed by will to the United States. It was contended that to impose a state estate tax would constitute the taxing of property of the United States. This Court said "no." That,

> "* * * the tax is not upon the property, in the ordinary sense of the term, but upon the right to dispose of it, and it is not until it has yielded this contribution to the state that it becomes the property of the legatee,"

and,

> "* * * that the tax is not a tax upon the property itself, but upon the transmission by will or by descent."

It was also pointed out that,

> "* * *the legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, and it is only upon this condition that the legislative assents to a bequest of it."

In *Snyder* v. *Bettman*, 109 U. S. 249, 23 Sup. Ct. 803, we find the converse of the *Perkins case*. In that case the United States imposed a succession tax upon a bequest to a municipal corporation of a state for a corporate and public policy.

The municipality contended that the tax could not be imposed because (1) the Federal government did not have and could not exercise the right to regulate the devolution of estates and (2) the municipality was a political subdivision of the state and being an instrumentality of a state Congress had no power to impose the tax on it. This Court decided both contentions adversely to the municipality.

As to the first proposition, the Court held that the power to regulate the descent of property is not a condition precedent to the power to impose an estate tax.

In connection with the second contention, it held that:

> "Conceding fully that Congress has no power to impose a burden upon a state or its municipal corporations, the question in each case is whether the tax is direct or incidental, * * * as the tax in the case under consideration is collected from the property while in the hands of the executor (#30) * * * we do not regard it as a tax upon the municipality, though it may operate incidentally to reduce the bequest by the amount of the taxes. * * *"

In brief, the tax was imposed while in the process of being transmitted from the dead to the living, and was therefore not a tax on the property of the municipality and did not burden a governmental instrumentality.

The cases cited by appellant under the proposition are cases wherein the instrumentality rule was applied to defeat the imposition of the tax. In none of them, excepting *Childers* v. *Pope*, 119 Okla. 300, 249 Pac. 726, was an estate tax involved. We refrain from burdening this brief with a discussion of those cases for the reason that the *Five Tribes case* is decisive on the proposition that the right to impose the tax herein involved will not be denied on the theory that it burdens or interferes with a Federal instrumentality, and for the further reason that in the opinion below in this case the Supreme Court of Oklahoma overruled the *Childers* v. *Pope case.*

In speaking of *Childers* v. *Pope* and *Childers* v. *Beavers*, 270 U. S. 555, 46 Sup. Ct. 387, the Supreme Court of Oklahoma in the opinion below had this to say:

> "Since our former decision in *Childers* v. *Pope, supra,* was based solely upon a following of the rule in *Childers* v. *Beavers, supra,* and since the Supreme Court of the United States in reversing various former decisions has itself 'in effect overruled' *Childers* v. *Beavers,* we are at liberty to depart from following it."

This Court in the *Five Tribes case* stated that,

> "*Childers* v. *Beavers, supra,* was in effect overruled by the *Mountain Producers decision.*"

It follows that neither *Childers* v. *Pope* nor *Childers* v. *Beavers* stand as a bar to the imposing of a tax in the instant case. Both cases have been overruled by the Court from which they came.

In the opinion below the Supreme Court of Oklahoma pointed out that the holding in *Childers* v. *Pope* that the portion of the estate of a restricted Indian consisting of land and minerals was not subject to the Oklahoma estate tax was not original with it,

> "* * * and that it is obvious the opinion was forcibly adopted by the controlling circumstances of an intervening opinion by the Supreme Court of the United States, to-wit: *Childers* v. *Beavers*, 270 U. S. 555, 70 L.ed. 730(7). It will be observed in reading the *Childers* v. *Pope* opinion that the decision was based solely on the rule of the *Beavers case, supra*, and in the *Pope case* this Court remarked it was not 'disposed to go further than the rule therein announced.' "

The appellant infers that after minerals are severed from the surface by conveyance (or by operation of an Allotment Act such as here involved) that Oklahoma imposes some form of tax thereon. The facts are that Oklahoma does not now and never has imposed any form of tax on minerals as such prior to production. In *State* v. *Shambin*, 185 Okla. 126, 90 Pac.(2d) 1053, the court held in the fifth syllabus that:

> "The Legislature has not provided for a severance of the various interests which may be held in real property for purposes of taxation."

In the seventh syllabus held that:

> "Oil and gas, while lying in the strata of earth from which they are produced must be taxed as real property to the owner of the land, if the land is taxable, under which for the time being they may lie."

To the same effect are the cases of *Secrest* v. *Williams*, 185 Okla. 449, 94 Pac. (2d) 252 and *Smith* v. *Anderson*, 196 Okla. 26, 162 Pac. (2d) 178.

It follows, that the Osages have always paid indirectly a tax on the minerals underlying their surplus lands because as the owners of the surface they paid an ad valorem tax thereon. For the same reason, they have never paid a tax on the minerals underlying their homestead land. We are speaking of a tax on minerals before production. In all instances the Osages have since 1921, paid gross production taxes on their interest in the oil and gas produced from both their surplus and their homestead lands.

At Page 25 of the brief, appellant suggests that Congress is without power to grant unto Oklahoma the right to impose an estate tax on those properties of the Osages that are connected with the minerals. This position is clearly refuted by *Gypsy Oil Co.* v. *Oklahoma Tax Commission*, 6 Fed. Sup. 6, wherein the right of Oklahoma to impose under the Federal Act a gross production tax on the production of oil and gas accruing to the Osages was sustained, and which case is for such reason authority supporting the proposition that Congress does not consider that a diminishing of the properties of the Osages through a non discriminatory tax prevents the carrying out of any provision of the law requiring a delivery of the properties to the Osages intact at the expiration of the trust period. This is further demonstrated by the fact that the Federal

government imposes both estate and income taxes on the Osages.

PROPOSITION No. 5

The tax here imposed is a non-discriminatory tax and does not burden an instrumentality of the government. The effect of the tax upon the government, if any, is extremely remote and inconsequential.

The right of a State to tax where Indians are involved has been denied in some cases on the theory that the tax sought to be imposed burdened a Federal instrumentality. No specific discussion of this principle is to be found in the brief of the appellant, but the principle does lurk in the background throughout her brief.

The tax here imposed is not imposed either directly or indirectly on property of the United States. It in fact is not a tax on the property of anyone. It is neither a tax on the living nor the dead. *United States* v. *Perkins, supra; Snyder* v. *Bettman, supra,* and other cases herein cited. It is an excise tax imposed on the transmitting of economic benefits from the dead to the living. The tax will never indirectly fall upon the United States because the Osages are not supported either in whole or in part from the United States Treasury. Their vast wealth is a matter of common knowledge throughout the United States and they need no financial aid from the Federal government.

The only way in which the United States is affected by an imposing of the tax, is the resulting accounting work

in the offices of the Federal agencies that supervise the affairs of the Indians. The supervisory work that is made necessary by the imposing of the tax is remote and inconsequential, and such work has never been adjudged to be such a burden as will defeat a tax. No one will assert that this work interferes with or impairs the efficiency of the various supervising agencies, or deprives these agencies of the power to serve the government in the manner that it was intended that they should serve it. The fact that the tax must directly and substantially interfere with and impair the agency before it will be denied is stated at Page 1288, § 607, of Cooley on Taxation, Vol. 2, 4th Ed., in the following language:

> "Note this important limitation: agencies of the Federal government are exempt from state taxation only so far as such taxation may interfere with or impair their efficiency in performing the function by which they serve the government. This has been stated over and over again. The state may tax the property of Federal agencies with other property in the state, and as other property is taxed, when no law of Congress forbids, and when the effect of the taxation will not be to defeat or hinder the operation of the national government. A different rule, as has been well said, 'would remove from the reach of state taxation all the property of every agent of the government. Every corporation engaged in the transportation of mails or of government property, of every description, by land or water, or in supplying materials for the use of the government, or in performing any service of whatever kind, might claim the benefit of the exemption,' and the effect would be to embarrass and injure the state to the benefit of individuals rather than of the nation. The test is whether the tax deprives the persons or corporations taxed, in truth, of power to serve

> the government as they were intended to serve it, or hinder the efficient exercise of that power."

That immunity from taxation does not extend to anything lying outside or beyond governmental functions and their exertions, and does not exist where the exercise of governmental functions is only remotely influenced, is settled in the case of *Fox Film Corp.* v. *Doyal*, 286 U. S. 123, 52 Sup. Ct. 546, and by the cases therein cited. It is therefore necessary for the appellant to here show that the tax imposed directly interferes with and directly burdens something that can be said to be a governmental function. This she cannot do.

In *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376, 58 Sup. Ct. 623, this Court committed itself to the rule that "where no direct burden is laid upon the governmental instrumentality, and there is only remote, if any, influence upon the exercise of the functions of government" the right of the state to tax will not be denied. We quote from Page 385 of the U. S. Report:

> "In numerous decisions we have had occasion to declare the competing principle, buttressed by the most cogent considerations, that the power to tax should not be crippled 'by extending the constitutional exemption from taxation to those subjects which fall within the general application of non-discriminatory laws, and where no direct burden is laid upon the governmental instrumentality, and there is only remote, if any, influence upon the exercise of the functions of government.' *Willcuts* v. *Bunn*, 282 U. S. 216, 225, 51 S. Ct. 125, 127, 75 L.ed 304, 71 A.L.R. 1260, and illustrations there cited."

The fact that this Court is now committed to the rule announced in the *Mountain Producers case*, and other cases of the same purport, is established in *New York* v. *United States, supra.* In that case this Court said that,

> "* * * in the older cases, the emphasis was on immunity from taxation. The whole tendency of recent cases reveals a shift in emphasis to that of limitation upon immunity."

This case is cited and quoted from at Pages 41 to 42, inclusive, of this brief, and to which we respectfully refer the Court.

The right to impose the tax here involved is not impliedly denied under the instrumentality rule, because the tax does not burden either directly or indirectly the Federal government or any agency thereof. It is also well settled that non-taxability will not be implied from the imposing of restrictions. In the case of *United States* v. *Board of Com'rs of Osage Co.* (C.C.A. 8th), 216 Fed. 883, appeal dismissed 244 U. S. 663, the Court held that non-taxability and non-alienability were separate and distinct things; that irrespective of the fact that surplus land of the Osages was made inalienable for at least twenty-one years and the imposing of an *ad valorem* tax thereon expressly denied for three years, an *ad valorem* tax could be imposed at the expiration of the three-year period notwithstanding it was not specifically provided in the Act that the surplus lands would be subject to an *ad valorem* tax too at the expiration of the three-year period. In the *Five*

Tribes cases this Court held that restrictions without more, is not the equivalent of a Congressional tax immunity.

See also:

Choate v. *Trapp, supra.*

Any suggestion that Oklahoma agreed, as a condition to admission to the Union or otherwise, either expressly or impliedly not to impose a tax where restricted Indians are involved, absent treaty or Federal law prohibiting the tax, is flatly contradicted by Sec. 5 of Art. 10 of Oklahoma's Constitution:

> "The power of taxation shall never be surrendered, suspended, or contracted away. Taxes shall be uniform upon the same class of subjects."

Taxes are the very life-blood of a State, and the taxing power of a State is never presumed to have been relinquished. Oklahoma did not expressly relinquish her sovereign power as a State to tax, and no implied relinquishment can be found in her Constitution or the Enabling Act. The provision of the Constitution that (1) Oklahoma disclaims all right and title to unappropriated lands and the lands of Indians (Art. I, Sec. 3) is directed solely to the claiming of lands and not the taxing thereof. Oklahoma does not here seek the lands of any Indian. She merely seeks the right to impose a tax and which if allowed can and will be paid from monies to the credit of the interested Indians in the Federal treasury. (2) Oklahoma agreed to recognize exemptions created by treaty or Federal law (Art. X, Sec. 6). No treaty or Federal law exempts

the estates of Osages from an Oklahoma estate tax. For such reason Section 6 has no application. (3) In the Enabling Act (Sec. I thereof) Oklahoma agreed in substance that nothing in the Constitution should be construed to limit the right and authority of the Federal government over the Indians and their lands. She is not here disputing the right and authority of the Federal government to exercise exclusive supervisory authority over the Indians. She does assert that in exercising this right the Federal government wholly failed to either directly or indirectly prohibit the imposing of the tax in controversy.

In *Coyle* v. *Smith*, 221 U. S. 559, 31 S. Ct. 688, this Court held that when Oklahoma was admitted to the Union she was admitted on equal footing with the other States; that Congress in admitting Oklahoma was without power to impose any restrictions that would deprive her of equality with other States.

The imposing of the tax in controversy is nowhere expressly denied. It is not impliedly denied because the tax does not directly or indirectly burden the Federal government or any agency thereof.

A late and comprehensive state case holding that *Helvering* v. *Mountain Producers Corporation, supra,* overruled the former cases inhibiting a tax of the exact nature here involved is that of *Santa Rita Oil Co.* v. *State Board of Equalization* (Mont.), 116 Pac.(2d) 1012. From the body of that opinion at Page 1014 (Pac.), the court said:

"With reference to the other two taxes the defendant's contention is that the law has been changed, not by Congressional Act, as contemplated in the decision, but by judicial interpretation. As its authority upon the question this court in its decision cited *Choctaw, O. & Gulf R. R.* v. *Harrison*, 235 U. S. 292, 35 S. Ct. 27, 59 L.ed. 234; *Gillespie* v. *State of Oklahoma*, 257 U. S. 501, 42 S. Ct. 171, 66 L.ed. 338; *Jaybird Mining Co.* v. *Weir*, 271 U. S. 609, 46 S. Ct. 592, 70 L.ed. 1112, and *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 52 S. Ct. 443, 76 L.ed. 815. The *Choctaw, Gillespie* and *Jaybird cases* held the lessees of Indian trust patent land to be such instrumentalities of the Federal government, and the *Coronado case* held lessees of state school lands to be such instrumentalities of the state government that their proceeds under the leases could not be taxed by the other government. The United States Supreme Court clearly considered the questions identical and in each case denied the right of either the State or the Federal government to impose the tax on the instrumentality of the other. In 1938 the United States Supreme Court in *Helvering, Com'r. of Internal Revenue* v. *Mountain Producers Corporation*, 303 U. S. 376, 58 S. Ct. 623, 626, 82 L.ed. 907, involving a federal tax upon the producer's share of oil taken from state school lands expressly overruled the *Gillespie* and *Coronado cases* upon the point, and in so doing necessarily overruled also the *Choctaw* and *Jaybird cases* and many others like them. The holding was not that the lessee of State or Federal land was not an instrumentality of the State or Federal government, but rather that the tax upon the instrumentality did not under the circumstances constitute an interference with governmental functions.

* * * * *

"The decisions then cited a number of authorities and concluded:

" 'These decisions in a variety of applications enforce what we deem to be the controlling view—that

immunity from non-discriminatory taxation sought by a private person for his property or gains because he is engaged in operations under a government contract or lease cannot be supported by mere theoretical conceptions of interference with the functions of government. Regard must be had to substance and direct effects. And, where it merely appears that the one operating under a government contract or lease is subjected to a tax with respect to his profits on the same basis as others who are engaged in similar businesses, there is no sufficient ground for holding that the effect upon the government is other than indirect and remote. We are convinced that the rulings in *Gillespie* v. *Oklahoma, supra,* and *Burnet* v. *Coronado Oil & Gas Co., supra,* are out of harmony with correct principle and accordingly they should be and they now are, overruled.

" 'In the instant case we find no ground for concluding that the tax upon the profits of Wyoming Associated derived under its lease from the state constituted any direct and substantial interference with the execution of the trust which the state has assumed, and the decision of the Circuit Court of Appeals (10th Cir.,) 92 Fed.(2d) 78, to the contrary must be reversed.' "

CONCLUSION

At all times since the provisions of the Osage Allotment Act were carried out (1909), the individual Osage allottees, and their heirs, have held and owned a restricted fee simple title in and to all of their properties by virtue of which all beneficial rights of ownership have rested in them. These rights include the right to farm or graze all of the lands and to take all the gains arising from such pursuits without restraint or restriction on the disposition

thereof, the right to quarterly payments; the right to control absolutely practically all of the properties free and clear of restrictions upon a certificate of competency being granted and the right to control absolutely all of the properties free and clear of restrictions at the expiration of the restricted period. These are all valuable property rights and were transmitted from Charles West, Jr., at his death, to his surviving wife and spouse — rights they had not theretofore enjoyed and thereafter only enjoyed because of the death of Charles West, Jr. It is the transmission of these economic benefits that the State of Oklahoma here seeks to tax. It does not seek to tax any property as such of Charles West, Jr. He is dead. After his death he had no property. It does not here seek to tax the property of his surviving mother and spouse because the tax attached before they received the property. The tax in controversy is not a tax on property. It is a non-discriminatory excise tax imposed on the transmission of economic benefits from the dead to the living.

No agency of the federal government is here protesting the assessment. It is protested by individual citizens of the State of Oklahoma. They assert that the tax should be denied because it is imposed on a Federal instrumentality. They have not shown, and cannot show, wherein the tax directly burdens the federal government or wherein the imposition thereof hinders or impedes the functions of any agency thereof. Since an imposing of the tax will neither

burden, hinder nor impede the Federal government, the appellant's position is not well taken.

The Appellee again says that the *Five Tribes case* is here controlling and that the judgment of the lower court should be sustained.

Respectfully submitted,

C. W. KING, General Counsel,
R. F. BARRY,
Oklahoma City, Oklahoma,
Attorneys for Oklahoma Tax Commission.

JOE M. WHITAKER,
Of Counsel.

MARCH, 1948.

APPENDIX I

Letter from the Treasury Department relating to the inheritance and estate taxes collected by the Federal government and is attached as Appendix I:

"TREASURY DEPARTMENT
Washington, 25
August 16, 1944

MT-DC-SRC,

Mr. J. Frank Martin,
Chairman, Oklahoma Tax Commission,
State of Oklahoma,
Oklahoma City, Oklahoma.

CWK:GN

Dear Mr. Martin:

Reference is made to your letter of July 25, 1944, requesting that you be advised under what authority Osage Indian trust funds and headrights are subject to inclusion in the gross estate of the deceased owner for Federal estate tax purposes. You also ask whether any other Federal taxes are imposed in respect of such property as a consequence of the death of the owner and request advice as to the manner in which the estate tax on the trust funds and headrights is set up and collected.

Section 811 of the Internal Revenue Code provides:

> "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States.
>
> "(a) Decedent's interest. To the extent of the interest therein of the decedent at the time of his death; * * *"

Section 81.13 of Estate Tax Regulations 105 provides:

> "Property of Decedent at Time of Death. It is designed by the foregoing provisions of the Internal Revenue Code that there shall be included in the gross estate all property of the decedent, whether real or personal, tangible or intangible, the beneficial ownership of which was in the decedent at the time of his death, except real property situate outside of the United States."

At the time of the passage of the Osage Allotment Act of June 26, 1906 (34 Stat. 539), the Osage Indians were occupying as a tribe their reservation in Oklahoma Territory containing approximately one and one-half million acres of land largely underlaid with oil, gas and other minerals. At the same time the Goverment held in trust for the tribe which consisted of 2,229 members, a fund of over eight million dollars received by the tribe as compensation for the relinquishment of other lands. The Act of June 26, 1906, provided for the allotment of the reservation lands to the members of the tribe, but the Act specifically reserved the oil, gas, coal and other minerals to the Osage Tribe for a period of twenty-five years from and after April 6, 1906 (unless further extended by Congress) and at the expiration of said period, the minerals were to become the property of the individual owner of the land. Section 4 of said Act provided that all funds of the Osage Tribe, all moneys due, and all moneys that may become due to the tribe, shall be held in trust by the United States for a period of twenty-five years from and after January 1, 1907, and that such funds should be segregated and placed to the credit of the individual members of the tribe on the basis of a *pro rata* division, as soon as practicable after January 1, 1907. Section 5 of the same Act provides that after the expiration of the twenty-five year trust period "the lands, mineral interest and moneys, hereinbefore provided for and held in trust by the United States shall be the absolute property of the individual

members of the Osage Tribe according to the roll * * * or their heirs, as herein provided, and deed to said lands shall be issued to said members or to their heirs * * * and said moneys shall be distributed to said members or to their heirs." The twenty-five year trust period was extended by the Act of March 3, 1921, to 1946, and was extended by the Act of March 2, 1929, to April 8, 1958.

In *Globe Indemnity Company* v. *Bruce*, 81 Fed. (2d) 143, *certiorari* denied, 297 U. S. 716, the Tenth Circuit Court of Appeals defined as Osage "headrights" to be the "right to receive the trust funds and the mineral interest at the end of the trust period, and during that period to participate in the distribution of the bonuses and royalties arising from the mineral estates and the interest on the trust funds." In holding that an Osage Indian owns a vested interest in his headright the Court said, in part:

> "We are of the opinion that the United States took the legal title to the funds and moneys in trust, but that the beneficial title to the funds and money vested in the individual members of the tribe; that there was reserved to the tribe an interest in the minerals for a stated period; and that the reversionary interest in the minerals vested in the members of the tribe to whom were allotted the surface, all subject to the paramount powers of Congress to deal with such property for the benefit of the tribe and its members.
>
> "This view is strengthened by a consideration of Section 6 of the Act of June 28, 1906 (34 Stat. 545), which refers to 'the lands, moneys and mineral interests,' of a 'member of the Osage Tribe,' and provides such 'lands, moneys and mineral interests * * * shall descend to his or her legal heirs.' This section indicates that a present equitable interest in the land, moneys and mineral interests vested in the members of the tribe and on the death of a member descends to his heirs.

> "* * * This practice (by the Secretary of the Interior) recognized that a member has a vested reversionary interest in the minerals and a vested right in the trust funds which he may dispose of by will."

The Supreme Court of Oklahoma in the case of *In re: Martin's Estate* (Okla. 1938), 80 Pac. (2d) 561, 566, stated:

> "The individual citizen (member of Osage Tribe) or his heirs, has a vested undivided interest in such lands, moneys or other properties, and such interest is an estate that may pass from the citizen to his heirs by inheritance, not from the tribe to such heirs."

As the Osage Indian owns a vested interest in his right to share in the tribal trust funds and mineral interests which passes upon his death to his heirs or devisees, the value of his interest in the property is includible in his gross estate under the provisions of Section 811(a) of the Internal Revenue Code. The decision of this office to include the headrights as a part of the decedent's gross estate was made June 25, 1940, and is applicable only to estates of decedents dying after June 25, 1940.

No Federal taxes other than estate taxes are imposed on the transfer by the death of the owner of the trust funds and headrights.

The interest of the decedent in the tribal trust funds and headrights is includible in the gross estate the same as any other property of the decedent and the estate tax is assessed and collected as in the case of a non-Indian except that the Superintendent of the Osage Indian Agency is regarded as the executor for the purposes of assessment and collection of the tax.

Very truly yours,

/s/ Joseph D. Numan, Jr.
Commissioner."

APPENDIX II

For the information of the Court as to the general situation covering Oklahoma Indians' funds held in trust by the government, the following tables are appended for such reference as the Court may find convenient and designated as Appendix II. This statement covers status of funds as to Oklahoma Tribes as of June 30, 1944, and as of June 30, 1947.

FUNDS HELD IN TRUST FOR INDIVIDUAL INDIANS AND ASSOCIATIONS OF INDIVIDUAL INDIANS OF THE STATE OF OKLAHOMA AS OF JUNE 30, 1944

AGENCY	CHECKING ACCOUNTS WITH THE TREASURER OF U. S.	INVESTMENTS IN BONDS ON DEPOSIT IN TREASURY		INVESTMENTS HELD BY SUPERINTENDENT	BANK DEPOSITS	TOTAL
		GROUP	INDIVIDUAL			
Cheyenne and Arapaho	$ 46,987.51	$ 35,000	$ 5,587.50	$	$	$ 87,575.01
Kiowa	302,575.24		415,187.50		53,300.00	771,062.74
Osage	57,362.40	11,672,000	4,066,025.00	1,127,262.15		16,922,649.55
Pawnee	10,296.46	125,000	218,637.52	11,829.58		365,763.56
Quapaw	87,660.79	3,335,000	974,091.00			4,396,751.79
Shawnee	18,534.98	194,000	39,040.00			251,574.98
Five Civilized Tribes	104,193.59	9,098,000	12,912,279.62	9,749.13		22,124,222.34
	$627,610.97	$24,459,000	$18,630,848.14	$1,148,840.86	$53,300.00	$44,919,599.97

Funds Held in Trust for Individual Indians and Associations of Individual Indians of the State of Oklahoma as of June 30, 1947

Agency	Checking Accounts with the Treasurer of U. S.	Securities		Investments Held by Superintendent	Total
		Group	Individual		
Cheyenne and Arapaho	$ 75,505.10	$ 35,000.00	$ 2,425.00	$	$ 112,930.10
Five Civilized Tribes	198,565.38	9,998,000.00	11,982,423.75	14,138.58	22,193,127.71
Kiowa	714,359.53	150,000.00	398,533.75		1,262,893.28
Osage	32,241.51	10,122,000.00	3,860,793.75	820,761.24	14,835,796.50
Pawnee	222,612.92	125,000.00	227,890.08		575,503.00
Quapaw	311,473.07	3,335,000.00	1,102,875.00		4,749,348.07
Shawnee	234,306.17	194,000.00	13,396.25		441,702.42
TOTALS	$1,789,063.68	$23,959,000.00	$17,588,337.58	$834,899.82	$44,171,301.08

SUPREME COURT OF THE UNITED STATES

No. 489.—October Term, 1947.

Mary Morton West, Osage Allottee No. 192, Appellant, v. Oklahoma Tax Commission.	On Appeal from the Supreme Court of the State of Oklahoma.

[June 14, 1948.]

Mr. Justice Murphy delivered the opinion of the Court.

This appeal concerns the power of the State of Oklahoma to levy an inheritance tax on the estate of a restricted Osage Indian. Specifically, the problem is whether property held in trust by the United States for the benefit of the Indian may be included within the taxable estate.

Charles West, Jr., was a restricted, full-blood, unallotted, adult Osage Indian. He died intestate in 1940, a resident of Oklahoma. No certificate of competency was ever issued to him. Surviving him was his mother, appellant herein, who is a restricted, full-blood Osage Indian. The entire estate passed to her as the sole heir at law.[1]

The Oklahoma Tax Commission entered an order levying a tax on the transfer of the net estate, valued at $111,219.18. With penalties, the total tax imposed was $5,313.35. Appellant made timely objection to the inclusion of certain items in the taxable estate. These items formed the bulk of the estate and had been held in trust

[1] The decedent was also survived by a widow. But she was prohibited by law from inheriting any part of the estate unless she was of Indian blood, a matter which was in dispute. A settlement was reached whereby the widow received a certain amount from the estate, apparently in return for giving up her claim as an heir.

for the decedent by the United States, acting through the Secretary of the Interior. Act of June 28, 1906, 34 Stat. 539, as amended, 41 Stat. 1249, 45 Stat. 1478, 52 Stat. 1034. The trust properties involved were as follows:

(1) One and 915/2520ths Osage mineral headrights. This item represented the decedent's undivided interest in the oil, gas, coal and other minerals under the lands in Osage County, Oklahoma, said minerals having been reserved to the use of the Osage Tribe by the Act of June 28, 1906.[2]

(2) Surplus funds in the United States Treasury, representing accruals of income to the decedent from the headrights.

(3) Stocks and bonds purchased by and in the name of the United States and held for the decedent by the Secretary of the Interior. These purchases were made with the surplus funds accruing from the headrights.

(4) Trust funds in the hands of the Treasurer of the United States, representing decedent's share of the proceeds of the sale of the Osage Tribe's lands in Kansas.

(5) Personal property purchased with surplus funds.

Appellant claimed that these properties were immune from state taxation by virtue of the relevant provisions of the Constitution, treaties and laws of the United

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[2] An Osage headright has been defined by one court as "the interest that a member of the tribe has in the Osage tribal trust estate, and the trust consists of the oil, gas, and mineral rights, and the funds which were placed to the credit of the Osage tribe, all fully set out in the above act [Act of June 28, 1906, 34 Stat. 539]." *In re Denison*, 38 F. 2d 662, 664. Another court has made this definition: "The right to receive the trust funds and the mineral interests at the end of the trust period, and during that period to participate in the distribution of the bonuses and royalties arising from the mineral estates and the interest on the trust funds, in an Osage headright." *Globe Indemnity Co.* v. *Bruce*, 81 F. 2d 143, 148–149. Headrights are not transferable and do not pass to a trustee in bankruptcy. *Taylor* v. *Tayrien*, 51 F. 2d 884; *Taylor* v. *Jones*, 51 F. 2d 892.

States; hence the Oklahoma Inheritance and Transfer Tax Act of 1939 (§§ 989–989t, Title 68, Okla. Stat. 1941) which authorized the assessment on the properties was invalid in this respect. The Oklahoma Tax Commission rejected this contention and the Supreme Court of Oklahoma affirmed. 199 Okla. —.

It is essential at the outset to understand the history and nature of the arrangement whereby the United States holds in trust the properties involved in this case. See Cohen, Handbook of Federal Indian Law (1945) 446–455. In 1866, the United States and the Cherokee Nation of Indians executed a comprehensive treaty covering their various relationships. 14 Stat. 799. It was there agreed that the United States might settle friendly Indians in certain areas of Cherokee territory, including what is now Osage County, Oklahoma; these areas had previously been conveyed by the United States to the Cherokees. The treaty further provided that the areas in question were to be conveyed in fee simple to the tribes settled by the United States "to be held in common or by their members in severalty as the United States may decide."

The Osage Indians subsequently moved to the Indian Territory and settled in what is now Osage County. In 1883, pursuant to the 1866 treaty, the Cherokees conveyed this area to the United States "in trust nevertheless and for the use and benefit of the said Osage and Kansas Indians." It is significant that fee simple title to the land was not conveyed at this time to the Osages; instead, the United States received that title as trustee for the Osages. Nor was any distinction here made between the land and the minerals thereunder, legal title to both being transferred to the United States.

On June 28, 1906, the Osage Allotment Act, providing for the distribution of Osage lands and properties, became effective. 34 Stat. 539. See *Levindale Lead Co.* v. *Cole-*

man, 241 U. S. 432. Provision was there made for the allotment to each tribal member of a 160-acre homestead, plus certain additional surplus lands. These allotted lands, said § 7, were to be set aside "for the sole use and benefit of the individual members of the tribe entitled thereto, or to their heirs, as herein provided." The homestead was to be inalienable and nontaxable for 25 years or during the life of the allottee. The surplus lands, however, were to be inalienable for 25 years and nontaxable for 3 years, except that the Secretary of the Interior might issue a certificate of competence to an adult, authorizing him to sell all of his surplus lands; upon the issuance of such a certificate, or upon the death of the allottee, the surplus lands were to become immediately taxable. § 2, Seventh; *Choteau* v. *Burnet*, 283 U. S. 691.

Section 3 of the Act stated that the minerals covered by these lands were to be reserved to the Osage Tribe for a period of 25 years and that mineral leases and royalties were to be approved by the United States. Section 4 then provided that all money due or to become due to the tribe was to be held in trust by the United States for 25 years;[3] but these funds were to be segregated and credited pro rata to the individual members or their heirs, with interest accruing and being payable quarterly to the members. Royalties from the mineral leases were to be placed in the Treasury of the United States to the credit of the tribal members and distributed to the individual members in the same manner and at the same time as interest pay-

[3] The trust under which these funds were to be held was established in 1865 by treaty between the United States and the Great and Little Osage Indians, 14 Stat. 687. By the terms of this treaty, the proceeds of the sale of Osage lands in Kansas were to be placed in the United States Treasury to the credit of the tribe. Provisions for carrying out the terms of this treaty were made by Congress in 1880, 21 Stat. 291.

ments on other moneys held in trust. In this connection, it should be noted that quarterly payments of interest and royalties became so large that Congress later limited the amount of payments that could be made to those without certificates of competence; provision was also made for investing the surplus in bonds, stocks, etc.[4]

According to § 5 of this 1906 statute, at the end of the 25-year trust period "the lands, mineral interests, and moneys, herein provided for and held in trust by the United States shall be the absolute property of the individual members of the Osage tribe, according to the role herein provided for, or their heirs, as herein provided, and deeds to said lands shall be issued to said members, or to their heirs, as herein provided, and said moneys shall be distributed to said members, or to their heirs, as herein provided, and said members shall have full control of said lands, moneys, and mineral interests, except as hereinbefore provided." It was also stated in § 2, Seventh, that the minerals upon the allotted lands "shall become the property of the individual owner of said land" at the expiration of 25 years, unless otherwise provided by Congress.

Moreover, § 6 provided that the lands, moneys and mineral interests of any deceased member of the Osage Tribe "shall descend to his or her legal heirs, according to the laws of the Territory of Oklahoma." Congress subsequently provided, in § 8 of the Act of April 18, 1912, 37

[4] By the Act of March 3, 1921, 41 Stat. 1249, Congress provided that so long as the income should be sufficient the adult Osage Indian without a certificate of competency should be paid $1,000 quarterly. See also Act of Feb. 27, 1925, 43 Stat. 1008. In the Act of June 24, 1938, 52 Stat. 1034, it was provided that where the restricted Osage had surplus funds in excess of $10,000 he was to be paid $1,000 quarterly, but if he had surplus funds of less than $10,000 he was to receive quarterly only his current income, not to exceed $1,000 quarterly.

Stat. 86, 88, that any adult member of the tribe who was not mentally incompetent could by will dispose of "any or all of his estate, real, personal, or mixed, including trust funds, from which restrictions as to alienation have not been removed," in accordance with the laws of the State of Oklahoma. Such wills could not be probated, however, unless approved by the Secretary of the Interior before the death of the testator.

The 25-year trust period established by the 1906 statute has been extended several times by Congress, first to 1946 (41 Stat. 1249), then to 1958 (45 Stat. 1478), and finally to 1984 (52 Stat. 1034). The last extension provided that the "lands, moneys, and other properties now or hereafter held in trust or under the supervision of the United States for the Osage Tribe of Indians, the members thereof, or their heirs and assigns, shall continue subject to such trusts and supervision until January 1, 1984, unless otherwise provided by Act of Congress."

Application of the foregoing provisions to the estate in issue produces this picture: Legal title to the mineral interests, the funds and the securities constituting the corpus of the trust estate is in the United States as trustee. The United States received legal title to the mineral interests in 1883, when it took what is now Osage County from the Cherokees in trust for the Osages; and that title has not subsequently been transferred. Legal title to the various funds and securities adhered to the United States as the pertinent trusts were established and developed. Beneficial title to these properties was vested in the decedent and is now held by his sole heir, the appellant. The beneficiary at all times has been entitled to at least a limited amount of interest and royalties arising out of the corpus. And the beneficiary has a reversionary interest in the corpus, an interest that will materialize only when the legal title passes from the United States at the end of the trust period. But until that period ends, the bene-

ficiary has no control over the corpus. See *Globe Indemnity Co.* v. *Bruce*, 81 F. 2d 143, 150.

Since 1819, when *McCulloch* v. *Maryland*, 4 Wheat. 316, was decided, it has been established that the property of the United States is immune from any form of state taxation, unless Congress expressly consents to the imposition of such liability. *Van Brocklin* v. *Tennessee*, 117 U. S. 151; *United States* v. *Allegheny County*, 322 U. S. 174. This tax immunity grows out of the supremacy of the Federal Government and the necessity that it be able to deal with its own property free from any interference or embarrassment that state taxation might impose. *McCulloch* v. *Maryland, supra; Wisconsin Railroad Co.* v. *Price County*, 133 U. S. 496.

In *United States* v. *Rickert*, 188 U. S. 432, the same rule was held to apply where the United States holds legal title to land in trust for an Indian or a tribe. The United States there held legal title to certain lands in trust for a band of Sioux Indians which was in actual possession of the lands. This Court held that neither the lands nor the permanent improvements thereon were subject to state or local ad valorem taxes. It was emphasized that the fee title remained in the United States in obvious execution of its protective policy toward its wards, the Sioux Indians. To tax these lands and the improvements thereon, without congressional consent, would be to tax a means employed by the Government to accomplish beneficent objects relative to a dependent class of individuals. Moreover, the United States had agreed to convey the lands to the allottees in fee at the end of the trust period "free of all charge or incumbrances whatever." If the tax in question were assessed and unpaid, the lands could be sold by the tax authorities. The United States would thus be so burdened that it could not discharge its obligation to convey unencumbered land without paying the taxes imposed from year to year.

Further application of the tax immunity rule to land held in trust by the United States for the benefit of Indians was made in *McCurdy* v. *United States*, 264 U. S. 484. That case involved surplus lands that had been allotted to members of the Osage Tribe. It will be recalled that the Osage Allotment Act of June 28, 1906, had made these surplus lands expressly taxable after three years or at the death of the allottee. The allottees in the *McCurdy* case died within the three-year period but before deeds to their allotted lands had been executed and delivered to them. Oklahoma sought to place a tax on the lands, the taxable date being within the three-year period and before the execution and delivery of the deeds to the heirs of the allottees. This Court held that legal title to the lands in issue was still in the United States as trustee on the taxable date, title not passing until the execution and delivery of the deeds. In reliance on the *Rickert* case, the conclusion was reached that the lands were not taxable while held in trust by the United States. See also *United States* v. *Board of Comm'rs of Fremont County, Wyo.*, 145 F. 2d 329; *United States* v. *Thurston County*, 143 F. 287.

Since the property here involved is all held in trust by the United States for the benefit of the decedent and his heirs, it is thought to be immune from any form of state taxation under the decisions in the *Rickert* and *McCurdy* cases. Reference is made to certain provisions of the Oklahoma Inheritance and Transfer Tax Act which indicate that the inheritance tax in issue might have a very real and direct effect upon the property to which the United States holds title, an effect similar to that which was emphasized in the *Rickert* case. The Act applies, of course, to the transfer of estates held in trust. § 989. Specific provision is then made in § 989i that "Taxes levied under this Act shall be and remain a lien upon all the

property transferred until paid." Provision is also made for the sale of estate property if necessary to satisfy the tax. §§ 989i and 989l. It is therefore possible that if the tax were unpaid Oklahoma might try to place a lien upon the property which is being transferred, property as to which the United States holds legal title. Complications might arise as to the validity of such a lien. And the United States would be burdened to the extent of opposing the imposition of the lien or seeing that the tax was paid so as to avoid the lien.

Moreover, insofar as the inheritance tax is paid out of the surplus and trust funds held by the United States, there is a depletion of the corpus to which the United States holds legal title. Such depletion makes that much smaller the estate which the Government has seen fit to hold in trust for the decedent's heirs. . If the estate is to be tapped repeatedly by Oklahoma until 1984 by the deaths of the various heirs, the result may be a substantial decrease in the amount then available for distribution.

But our decision in *Oklahoma Tax Commission* v. *United States*, 319 U. S. 598, has foreclosed an application of the *Rickert* and *McCurdy* cases to the estate and inheritance tax situation. Among the properties involved in the *Oklahoma Tax Commission* case were restricted cash and securities, which could not be freely alienated or used by the Indians without the approval of the Secretary of the Interior. We held that the restriction, without more, was not the equivalent of a congressional grant of estate tax immunity for the transfer of the cash and securities. Moreover, express repudiation was made of the concept that these restricted properties were federal instrumentalities and therefore constitutionally exempt from estate tax consequences. See also *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376. The very foundation upon which the *Rickert* case rested was thus held to be inapplicable.

We fail to see any substantial difference for estate tax purposes between restricted property and trust property. The power of Congress over both types of property is the same. *Board of Commissioners* v. *Seber*, 318 U. S. 705, 717; *United States* v. *Ramsey*, 271 U. S. 467, 471. Both devices have the common purpose of protecting those who have been found by Congress to be unable yet to assume a fully independent status relative to property. The effect which an estate or inheritance tax may have is the same in both instances; liens may be placed on both restricted and trust properties and lead to complications; and both types of property may of necessity be depleted to assure payment of the tax. The fact that the United States holds legal title as to trust property but not as to restricted property affords no distinguishing characteristic from the standpoint of an estate tax. In addition, Congress has given no indication whatever that trust properties in general are to be given any greater tax exemption than restricted properties. Hence the *Oklahoma Tax Commission* case must control our disposition of this proceeding.

Implicit in this Court's refusal to apply the *Rickert* doctrine to an estate or inheritance tax situation is a recognition that such a tax rests upon a basis different from that underlying a property tax. An inheritance or estate tax is not levied on the property of which an estate is composed. Rather it is imposed upon the shifting of economic benefits and the privilege of transmitting or receiving such benefits. *United States Trust Co.* v. *Helvering*, 307 U. S. 57, 60; *Whitney* v. *Tax Commission*, 309 U. S. 530, 538. In this case, for example, the decedent had a vested interest in his Osage headright; and he had the right to receive the annual income from the trust properties and to receive all the properties at the end of the trust period. At his death, these interests and rights passed to his heir. It is the transfer of these incidents,

rather than the trust properties themselves, that is the subject of the inheritance tax in question. In this setting, refinements of title are immaterial. Whether legal title to the properties is in the United States or in the decedent and his heir is of no consequence to the taxability of the transfer.

The result of permitting the imposition of the inheritance tax on the transfer of trust properties may be, as we have noted, to deplete the trust corpus and to create lien difficulties. But those are normal and intended consequences of the inheritance tax. And until Congress has in some affirmative way indicated that these burdens require that the transfer be immune from the inheritance tax liability, the *Oklahoma Tax Commission* case permits that liability to be imposed. But that case also makes clear that should any of the properties transferred be exempted by Congress from direct taxation they cannot be included in the estate for inheritance tax purposes. No such properties are here involved, however.

We have considered the other points raised by the appellant but deem them to be without merit. The judgment below is therefore

Affirmed.

THE CHIEF JUSTICE, MR. JUSTICE FRANKFURTER and MR. JUSTICE DOUGLAS dissent.